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**REPORTS**  
**OF**  
**CASES AT LAW AND IN CHANCERY**

**ARGUED AND DETERMINED IN THE**  
**SUPREME COURT OF ILLINOIS.**

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**By NORMAN L. FREEMAN, 29**  
**REPORTER.**

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**VOLUME LIX.**

**CONTAINING THE CASES DECIDED AT THE JUNE TERM, 1871, A PORTION OF**  
**THE CASES DECIDED AT THE SEPTEMBER TERM, 1871, AND**  
**SOME OMITTED CASES SUBMITTED AT THE**  
**JANUARY TERM, 1871.**

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RULES OF PRACTICE  
IN THE  
SUPREME COURT OF ILLINOIS.

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*Adopted at Mt. Vernon, June 18, 1873.*

**RULE 56.** *Ordered,* That SIDNEY BREESE, one of the Justices of this Court, be and he is hereby chosen Chief Justice thereof, to hold such office until the first Monday of June, A. D. 1874.

That hereafter the Justice of this court (excepting JUSTICE BREESE,) being highest in rank, shall be the Chief Justice for the term of one year, commencing with the expiration of the term of the preceding Chief Justice.

That when two or more Justices of this Court shall be elected on the same day, for the same term of office, they shall determine their seniority by lot; but if their terms be different, then the one having the shortest term shall be regarded as senior.

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*Adopted at Ottawa, September 26, 1873.*

**RULE 57.** *Ordered,* That the Clerk of this Court be required at each term to docket all petitions for rehearing, separate and apart from the trial docket.

**RULE 58.** *Ordered,* In all cases in this Court where the defendant in error or appellee desires to plead and not join in error, he shall file such plea in the office of the Clerk at least five days before the cause stands for trial, and the issue thereon must be made up before the day the cause stands for trial.

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*Adopted at Springfield, January 31, 1874.*

**RULE 59.** *Ordered,* In all cases where the evidence shall be taken and written out by a short-hand reporter, and shall be embodied in the bill of exceptions or certificate of evidence, the same shall not be printed in the abstract as returned by such reporter, but the same shall be by plaintiff in error or appellant condensed so as to present the substance of such evidence clearly and concisely in the abstract.

**RULE 60.** *Ordered,* In all civil cases docketed in one Grand Division, and the parties desire to change the venue to either of the other Grand Divisions, the same may be done only under an order of the Court where the cause has been docketed.





C A S E S

IN THE

SUPREME COURT OF ILLINOIS.

---

SOUTHERN GRAND DIVISION.

JUNE TERM, 1871.

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MINERVA MERRILL *et al.*

v.

RICHARD ATKIN.

1. **HEIRS**—*who included therein.* Under the word "heirs" are comprehended the heirs of heirs, *ad infinitum*.

2. **WITNESS**—*competency, under act of 1867.* So, the second section of the act of 1867, which prohibits a party from testifying when the adverse party sues or defends "as executor, administrator, *heir*, legatee or devisee of a deceased person," with certain exceptions enumerated in the act, applies as well in favor of the heir by one remove as in behalf of the immediate heir. The true intent of the statute was to make the right of a party to testify a mutual right, and not to grant it, with the exceptions enumerated in the act, where the adverse party claims in a representative capacity under a deceased person.

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Opinion of the Court.

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WRIT OF ERROR to the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. B. B. SMITH, for the plaintiffs in error.

Mr. H. C. GOODNOW and Mr. W. W. WILLARD, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This case has already been before this court, on the original bill, and is reported in 39 Ill. 62, under the title, *Atkin v. Merrill*. The facts are there stated, and it is unnecessary to repeat them. It was then said by the court, that Atkin could assert his alleged equitable rights in the premises only by a cross bill. He has since filed his cross bill, and the court has given him the relief asked. The decree, however, rests substantially on his own testimony, which was objected to on the hearing, and a reversal of the decree is now asked, because of its admission.

We can not consider him a competent witness. Under the act of 1867, a party is not a competent witness where the adverse party sues or defends as executor, administrator, heir, legatee or devisee of a deceased person, with certain exceptions enumerated in the act, in none of which does the present case fall. Atkin testified as to certain transactions between himself and Nelson C. Merrill, now deceased. The plaintiff in error, Minerva Merrill, not only claimed dower in the premises as widow of Nelson C. Merrill, which claim was admitted by Atkin, the defendant in error, but she also claimed four ninths of the premises in fee. Atkin set up a lien paramount to this last claim. The plaintiff in error claimed the four ninths as the heir of two of her deceased children, who had inherited from their father, her husband. It is said she is not claiming as heir of her husband, and, therefore, the case does not fall within the prohibition of the second section of the statute. It is true, she does not claim as

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Syllabus.

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the immediate heir of her husband, but she does claim as his heir through her children. She claims under him by inheritance. Under the word heirs are comprehended the heirs of heirs, *ad infinitum*. Bouvier's Law Dic., where the authorities are cited.

The case, then, falls not only within the letter, but the spirit, of the second section of the statute, the evident intent of the legislature being to make the right of a party to testify a mutual right, and not to grant it where the adverse party claims in a representative capacity under a deceased person, with certain exceptions not applicable to the case at bar. The necessity of such a restriction is too apparent to need comment, and applies as well in favor of the heir by one remove as in behalf of the immediate heir.

The decree is reversed and the cause remanded.

*Decree reversed.*

---

WALDON BIVENS *et al.* SCHOOL DIRECTORS, ETC.

v.

JOSEPH HARPER.

**GARNISHEE**—*money in the hands of School Directors.* Certain garnishees answered that they were School Directors; that the judgment debtor was employed by them as the teacher of the common school in the district; that there was due him a certain sum of money but that he had not made out his schedule; that previously the directors and teacher had entered into a special agreement, that the directors should make the schedule payable to a third person; that they had no property, means or effects belonging to the teacher, in their hands except the money earned for teaching, and nothing as individuals: *Held*, upon the facts, on the authority of the ruling in *Millison v. Fisk*, 43 Ill. 112, the money thus in the hands of the directors was not liable to garnishment.

WRIT OF ERROR to the Circuit Court of Johnson county.

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Opinion of the Court.

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Mr. O. A. HARKER, for the plaintiffs in error.

Mr. W. J. ALLEN, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding instituted for the purpose of reaching moneys in the hands of school directors, to which Hill would be entitled, on the return and proper certificate of his schedule, as the teacher of a common school. It appears that defendant in error recovered a judgment for the sum of \$119.18 against Hill, in the Johnson Circuit Court; that an execution was issued and returned no property found, and the affidavit required by the statute was filed. A garnishee summons was issued and served on plaintiffs in error. They appeared, and answered that they were school directors; that Hill was teaching a school in the district, employed by them as directors, at \$40 per month; that he had kept school about three and a half months, and that there was due to him near \$140; that he had not made out his schedule; that in the previous month of November the directors and teacher had entered into and made a special arrangement or agreement that the directors should make the schedule payable to one Roland; that they had no other property, means or effects of Hill in their hands or possession, and they owed him nothing unless the money earned for teaching, but nothing as individuals. On a hearing on interrogatories and the answer, the court below rendered judgment against plaintiffs in error, for the amount which had been earned by Hill as such teacher. We are asked to reverse the judgment, on the ground, that the law does not warrant a judgment against the garnishees, on the facts disclosed on the hearing below.

The case of *Millison v. Fisk*, 43 Ill. 112, was similar to this, in all its material features. It was there held, that money thus in the hands of school directors or their treasurer, was not liable to garnishment. That case must control this, and the judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

## ST. LOUIS &amp; MEMPHIS PACKET COMPANY

v.

JAMES F. PARKER.

1. AGENT—*act of, whether binding on his principal.* Although an agent's authority may be special and limited, yet if the principal permits such agent to advertise his name as agent generally, without noting such limitation, and the agent acts outside of his authority, the principal will be bound thereby, unless the party with whom he deals had notice of the limitation.

2. Although the act of an agent, outside of the scope of such agent's authority, is not binding upon his principal, yet the principal may ratify such act and thus render it obligatory upon him.

APPEAL from the Circuit Court of Alexander county ; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. ALLEN, WEBB & BUTLER, for the appellant.

Messrs. MULKEY, WALL & WHEELER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an action of assumpsit in the Alexander circuit court, by the plaintiff, Parker, against the St. Louis and Memphis Packet Company.

The declaration alleges, that the defendant was a common carrier of freights, from the city of Memphis to the city of St. Louis and to intermediate points by water, and was possessed of divers boats running between those points, and that the plaintiff, at the request of the defendant, delivered to defendant divers goods and merchandise, describing them, to be taken and safely carried from a certain designated point on the route to St. Louis, consigned to certain named commission merchants in St. Louis. The breach is, that they did not safely carry and deliver.

The contract to receive and carry this freight, it appears, was made by the plaintiff with Charles T. Hinde, who represented himself to the public and to the plaintiff as the agent of the defendant company.

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Opinion of the Court.

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About one half of the lumber was taken under this contract with the agent, and the balance swept away by the rising flood of the Mississippi, it having been piled on the bank of that river, ready for shipping, under the contract with Hinde.

The only question in the case arises upon the instructions. Appellant insists that the court should have given the fifth instruction asked by him, without qualification or modification.

That instruction was as follows: The defendant had the authority and right, in selecting Capt. Hinde as its agent at the city of Cairo, to limit his authority to bind or contract for them to said city of Cairo.

This instruction announces a principle which this court has always approved, and may be considered settled law, but if given as asked it could not have failed, with the testimony before the jury, to have misled them. The extent of Hinde's agency was a principal question before the jury, and on that there was contradictory evidence. The instruction implies Hinde's agency was special and limited. The court modified it in this way: But if you find from the evidence that the defendant employed Capt. Hinde as agent at Cairo, and permitted him to advertise his name as agent, without noting such limitation, the plaintiff would not be bound by such limitation, unless you find, from the evidence, that he had notice that the power of said Hinde was so limited.

This modification was proper and presented the point to the jury in its true aspect. 1 Pars. on Con. 44.

Appellant also complains of the refusal of the court to give the sixth, seventh and eighth instructions, asked by him.

The sixth and seventh are objectionable, as they include the proposition, that an agent for a public common carrier, published to the world as a general agent of such carrier, may set up in defense of his principal any private instructions he may have received, or limitations upon his supposed general powers, imposed by such principal. Such a proposition is inadmissible.

The eighth instruction is a mere repetition of the fifth, which the court properly refused.

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Syllabus.

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The court had instructed the jury, at the instance of the defendant, that the act of an agent can only bind the principal within the scope of such agent's authority, and any act of such agent beyond or outside of such an authority, can not bind the principal.

This contains a correct legal proposition, as a general one; but the unauthorized act of an agent may be ratified by his principal.

The court also instructed the jury on behalf of the plaintiff, that when a party employs an agent in a public employment, such as that of a public common carrier, and suffers such agent to advertise himself as such an agent, the principal can not, by private instructions, limit the authority of the agent, and thereby avoid responsibility as such principal.

We think this instruction, together with the one given for the defendant next preceding, and marked fourth in the series, with the fifth for defendant, as modified, placed the law of the case in a clear light before the jury.

We see no error in the record, and affirm the judgment.

*Judgment affirmed.*

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WILLIAM R. TIPTON *et al.*

v.

THOMAS UTLEY.

1. ALLEGATIONS AND PROOFS—*variance*. In an action on a promissory note, the declaration described the note as payable "*in* twelve months after date," while the one offered in evidence was payable "twelve months after date:" *Held*, there was no variance—the legal effect being the same, as neither would become due until the expiration of twelve months.

2. It has been held that, where a note was declared on as payable "*on or before*" a certain day, and the one offered in evidence was payable "*on*" that date, there was no variance.

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Syllabus. Statement of the case.

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3. *Quære*—whether a note payable in twelve months after date could be legally discharged by the maker before the expiration of the time the note has to run.

4. **EXCESSIVE DAMAGES**—*small amount*. In an action on a promissory note, where the judgment was too large by the sum of eighteen cents, the excess being simply an error in the computation of the amount found to be due on the note, it was *held*, the amount was too trifling to be made a ground for the reversal of a judgment.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action of assumpsit on a promissory note, by Thomas Utley against William R. Tipton and others. The special count in the plaintiff's declaration was as follows:

"For that, whereas, the defendants, at the county of St. Clair aforesaid, on the 1st day of January, A. D. 1870, by the names and styles of W. R. Tipton, L. M. Tipton, S. P. Tipton and J. R. Padfield, made their promissory note, in writing, and delivered the same to the plaintiff, and thereby jointly and severally promised to pay to the plaintiff, or order, the sum of \$224.24, for value received, with interest at the rate of 10 per cent per annum, in twelve months after the date thereof, which period has now elapsed; and the defendants, then and there, in consideration of the premises, promised to pay the amount of said note to the plaintiff, according to the tenor and effect thereof; yet the defendants have disregarded their promises, and have not paid said note, nor any part thereof; but the same remains wholly unpaid," &c.

The plaintiff also filed an affidavit for an attachment against two of the defendants, alleging, as ground for suing out the writ, "That the said Landon M. Tipton and Samuel P. Tipton are about fraudulently to conceal, assign and otherwise dispose of their property and effects, so as to hinder and delay their creditors," &c.

To the declaration the defendants filed the general issue, and to the writ of attachment the defendants Landon M. and



## Statement of the case. Opinion of the Court.

Samuel P. Tipton, plead in abatement, traversing the allegations in the affidavit, to which pleas the plaintiff added *similar*s.

Upon the trial, the plaintiff offered in evidence the following note :

|  |   |
|--|---|
| <p>.....<br/>         U. S. Stamp.<br/>         15 Cents.<br/>         .....</p> | <p>\$224.24. Twelve months after date, we, or<br/>         either of us, promise to pay to Thomas Utley,<br/>         or order, the sum of two hundred and twenty-<br/>         four dollars and twenty-four cents, for value received, with<br/>         interest at the rate of ten per cent per annum.</p> |
|--|---|

January 1st, 1870.

W. R. TIPTON.

L. M. TIPTON.

S. P. TIPTON.

J. R. PADFIELD.

To the reading of which promissory note in evidence, the defendants objected, for the reason that the promissory note in the special count of the declaration described, is payable *in twelve months after the date thereof*, and the note offered in evidence is payable *twelve months after date thereof*, consequently there is a variance.

The court overruled the objection, to which decision of the court the defendants excepted.

Upon the hearing of further evidence offered by both parties, and the instructions of the court, the jury found a verdict for the plaintiff, upon which judgment was entered. The defendants appeal.

Mr. WILLIAM WINKELMAN, for the appellants.

Mr. WILLIAM H. UNDERWOOD, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

We do not think there is any variance between the note described in the declaration and the one offered in evidence. The note described in the declaration is one payable *in twelve months after date*, and the one offered in evidence is payable

## Opinion of the Court.

*twelve months after date.* The legal effect is the same. Neither would become due until after the expiration of twelve months from the date of the note.

It has been held by this court, that where the declaration describes the note as payable *on or before* a certain day, and the one offered in evidence was payable *on* a certain day, there was no variance between the declaration and the proof. *Morton v. Tenny*, 16 Ill. 494.

It may be that a note made payable *in* twelve months after date, could be legally discharged by the payer before the expiration of the time the note has to run; but that fact would not make the note become due at any earlier date than if the note had been made payable twelve months after date. The note is substantially described in the declaration according to its legal effect, and that is all the law requires. We will indulge in no metaphysical distinctions to defeat the ends of justice.

It is insisted that the judgment is too large, by the sum of eighteen cents. The excess in the judgment is simply an error in the computation of the amount found to be due on the note. The amount is too trifling to be made the ground for the reversal of the judgment. The objection is without any merits whatever.

The only serious question that can arise on this record, is, whether the evidence is sufficient to sustain the verdict on the plea in abatement to the writ of attachment.

After a careful consideration of the evidence, we can not say that it fails to sustain the finding of the jury. It can not be denied that there is evidence tending to prove the issues on the part of the appellee. Although the evidence is slight, we can not say that it does not warrant the conclusion reached by the jury. The rule is well established, that where there is a contrariety of evidence, we must regard the verdict as settling the controverted facts. This case affords no sufficient reasons for a departure from that rule.

Upon a full consideration of the whole case, we are of opinion that, substantially, justice has been done, and the judgment must be affirmed.

*Judgment affirmed.*

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SARAH ANN HUTCHINGS *et al.*

v.

SARAH E. HUGGINS.

1. **HOMESTEAD—mode of release.** Where a husband and wife execute a mortgage upon lands to which a homestead right has attached, a release or waiver of such right can not be effected by the officer's certificate of acknowledgment alone. There must be a formal release or waiver of the statute, signed by the party releasing.

2. **REFORMING A DEED—so as to affect the rights of a married woman.** It is not competent for a court of equity to reform a mortgage conveying the interest of a married woman in real estate, executed by her, jointly with her husband, so as to essentially change its provisions.

WRIT OF ERROR to the Circuit Court of Perry county; the Hon. M. C. CRAWFORD, Judge, presiding.

Mr. EDWARD V. PIERCE and Mr. D. W. FOUNTAIN, for the plaintiffs in error.

Messrs. HAMMACK & DAVIS, and Mr. GEORGE W. WALL, for the defendant in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This case comes to this court upon error to the Perry county circuit court.

On the 17th of April, 1868, defendant in error filed her bill against plaintiffs in error, as the widow and heirs at law of William Hutchings, deceased, to reform and foreclose a mortgage made on the 25th of February, 1857, by said William Hutchings, and Sarah Ann Hutchings, his wife, to one Gilbert

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L. Rice, upon lands therein described, which appear to have been the homestead of mortgagors, to secure Rice for becoming surety to said William upon his bond as guardian for defendant in error. In February, 1868, the mortgage was assigned by Rice to defendant in error.

William Hutchings, as the bill alleges, died in August, 1865, leaving Sarah Ann Hutchings, his widow, and John Hutchings, William A. Hutchings, Mary Hutchings, Susan Hutchings, Franklin Hutchings and Malinda Hutchings, his children and heirs at law, him surviving.

Said Mary, Susan, Franklin and Malinda Hutchings were minors at the time of filing the bill, for whom a guardian *ad litem* was appointed. The adult defendants were defaulted, and the bill as to them taken as confessed. As to the minors, proof was taken, to which we shall particularly advert hereafter.

The only allegation in the bill upon which to base the reformation of the mortgage, was this: "That said mortgage was duly acknowledged before J. R. Hutchings, then and now a justice of the peace of said Perry county, but that said justice, through mistake and oversight, did not make a full certificate of same."

Prayer that defendants answer; that an account be taken of what is due to oratrix; that said mortgage be foreclosed to pay her, and that the lands described be subjected to sale to pay her debt; "that said mortgage and certificate be decreed to be corrected and sold, as above prayed for," and for further relief.

A copy of the mortgage was attached to the bill, from which it appears that it is wholly silent, both in the body and every part of the instrument, and the certificate of acknowledgment, as respects any release or waiver of the homestead exemption.

The only witness examined in the case was the said justice, whose testimony, so far as it related to the alleged mistake, was, that he prepared the mortgage for said William Hutchings, and Sarah Ann, his wife, to Gilbert L. Rice; that the

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said William Hutchings, and Sarah Ann Hutchings, his wife, intended, and witness was so instructed by them, to prepare a mortgage conveying all their right, title and interest in and to said mortgaged lands, including the homestead exemption under the laws of the State of Illinois. That is, in their acknowledgment of said mortgage the said William Hutchings acknowledged the same in due form, and acknowledged that he relinquished his right to the same as a homestead under the laws of the State of Illinois; that Sarah Ann Hutchings, then the wife of said William Hutchings, made her mark to said mortgage; that said mortgage was read to her, and witness explained to her the contents of said mortgage, and, on examination separate and apart, and out of the hearing of her said husband, she acknowledged that she had executed the same freely and voluntarily, and without any fear or compulsion on the part of her said husband, and relinquished her dower in and to the mortgaged premises, and all her right to said lands described in said mortgage as a homestead under the laws of the State of Illinois. This was all the evidence relating to any mistake in the preparation, execution, or acknowledgment of the mortgage.

Upon this evidence alone, and the decree *pro confesso* against the adult defendants, the court rendered a final decree that said mortgage and said acknowledgment thereof, be, in all respects, taken and considered as by the parties intended, and that it be so considered as having relinquished all right of homestead of said parties in said estate as by the laws of the State of Illinois provided. The decree found the amount due the complainant, foreclosed the mortgage and ordered a sale of the premises.

The bill contained no allegation that the premises were not subject to the homestead exemption, or that there was any agreement or understanding between the mortgagors and the mortgagee that the former should release or waive their homestead exemption, or that there was any mistake about the matter except simply as to the certificate of acknowledgment,

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or that the mortgagee accepted the mortgage under any misapprehension whatever, or any allegation of fraud, imposition or surprise. The justice who took the acknowledgment does not testify that he made any mistake in certifying the acknowledgment, or how it happened to be wholly silent as to the homestead exemption. For aught that appears, the mortgagee himself may have declared himself satisfied with it in the form in which it was. There is no evidence of any understanding between him, or any other person for him, and the mortgagors, that it should be otherwise than as made. He kept it for upwards of ten years, without, so far as this record shows, ever having made any objection to it.

It would seem that the central idea of reforming an instrument should be to make it conform to the intention of the parties, for certainly a court of equity would not reform an agreement, by superadding a clause or provision that both parties had not agreed to, especially in the absence of fraud or imposition. The mortgagee may have, and, under the circumstances, should be presumed to have, accepted it just as it was. His assignee alleges nothing to the contrary, makes no allegation of want of conformity with the agreement or understanding between the parties to the instrument, but only that the mortgagors duly acknowledged it, and that the justice, by mistake or oversight, did not make a full certificate of the same; and even this allegation is not sustained by the evidence, because the justice says nothing about any mistake or oversight on his part, and in no way accounts for the omission. But concede that the allegation is sustained, then, inasmuch as it is not pretended that there was any mistake or omission in regard to the body of the mortgage, how is the mistake, as to the certificate, material? If it had been as full as language could make it, would the mortgage have been operative to release the homestead exemption?

The statute, amendatory of the act of 1851, and requiring the signature and acknowledgment of the wife as conditions to the alienation of the homestead, went into effect on the 17th

day of February, 1857, and this mortgage was executed on the 25th day of the same month, so that it is governed by the provisions of the homestead act as amended.

The statute declares that no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder, and by his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are, by law, required to be acknowledged.

In *Kitchell v. Burgwin et ux.* 21 Ill. 40, this court held that a formal release or waiver of the statute must be executed. "That it must appear," said the court, "that the privileges and advantages of the act were in the contemplation of the parties executing the deed, and that they were expressly released or waived in the mode pointed out in the statute."

In *Vanzant v. Vanzant*, 23 Ill. 536, the question was again before the court, and after referring to, and approving what was said in the *Kitchell* case, the court said: "We wish to be understood as saying that the waiver or release must be a formal one. The insertion in the deed of conveyance of the special or general covenants usually inserted, without express reference in the deed to this act, can not operate as a release or waiver of it. There must be a writing expressly manifesting the intention to waive or release, and that writing must be signed by the party releasing, and it must be acknowledged as an ordinary deed is acknowledged. This release or waiver may well be in the body of the deed, and precede the signature of the grantors, for they must sign it. A mere statement by the officer, in his certificate of acknowledgment, that the householder released or waived the benefits of the act, will not be a compliance with the act, for it is not a writing subscribed by the householder, as the act imperiously demands."

The court also held, in that case, that, as it regards the wife who joins in the execution since the act of 1857, a fair construction of that act, taken in connection with the conveyance act, would require the officer taking the acknowledgment of the wife to certify, also, that he fully informed her of her

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Opinion of the Court.

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rights under the act, and that she voluntarily released and waived all right and benefit under it.

This construction was again directly confirmed in the case of *Boyd v. Cudderback*, 31 Ill. 113, and again in *Smith v. Miller et ux.* 31 Ill. 157. In the latter case, the court, construing the act of 1857, literally, holds both the signature of the wife and acknowledgment by her of an instrument formally releasing or waiving the exemption, to be necessary conditions to the alienation of the homestead.

The points definitely settled by the cases referred to, are decisive of this case.

As no mistake is alleged respecting the body of the mortgage, which contains no allusion to homestead exemption, that alleged in respect to the certificate of acknowledgment, is wholly immaterial, because the correction of it, if it were competent for a court of equity to do so, would make it no better than if it had been originally made perfect by the officer, and if it had been, originally, ever so perfect in itself, still, without a formal release or waiver of the exemption contained somewhere in the mortgage, preceding the signature of the grantors, the homestead could not have been alienated by the mortgage. So that the decree declaring the mortgage effectual to relinquish the homestead, by the correction of the certificate of acknowledgment, and that was all the bill sought to have done, is, in effect, holding that a release or waiver of the homestead may be effectual by the officer's certificate alone, which, as we have seen, is not the law.

The question, whether it is competent for a court of equity to correct the certificate of acknowledgment of the wife where she joins with her husband in a deed, is not necessarily involved in this case, because there is one that reaches much further, viz: whether it is competent to correct the deed itself, in a particular without which the acknowledgment is wholly immaterial. The mortgage could not be effectual to release or waive the homestead exemption, without superadding a clause referring to such exemption, and expressly releasing or waiving



it. By doing so, the instrument would be essentially changed. The competency of a court of equity to reform a mortgage given by a wife, joining with her husband in the execution of it, by essentially changing its provisions, was explicitly denied by this court in the case of *Moulton et ux. v. Hurd*, 20 Ill. 137. We are entirely satisfied with both the reasons and conclusions of the court in that case, and they apply with equal force in this.

The decree of the court below must be reversed and the cause remanded, for further proceedings not inconsistent with this opinion.

*Decree reversed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, use, etc.

v.

PRESLEY J. CURRY *et al.*

**SURETIES OF ADMINISTRATOR**—*effect of giving an additional bond.* A new or additional bond, given by an administrator under section seventy-eight of the Statute of Wills, can not operate to discharge his sureties in the original bond.

APPEAL from the Circuit Court of Clay county; the Hon. RICHARD S. CANBY, Judge, presiding.

Mr. B. B. SMITH and Mr. H. H. CHESLEY, for the appellant.

Mr. A. SHAW, Mr. W. B. COOPER and Mr. R. P. HANNA, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This is a suit upon an administrator's bond, executed by Curry, as administrator, and Moore and others, as securities.

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| 59  | 35  |
| 164 | 270 |
| 59  | 35  |
| 171 | 238 |

There are a number of unnecessary pleas and replications, and from an examination of the record, it is somewhat difficult to determine the exact state of the pleadings.

The principal assignment of error, the determination of which disposes of the case, is the overruling of the demurrer to the sixth special plea.

That plea is substantially as follows :

That after making the bond sued on, and while Curry was administrator, it was suggested to the county court, by William H. Hanna and others, that the administrator had been committing waste of the estate ; that he was notified, and thereupon the county court made an order, requiring him to execute an additional bond, with security ; that in pursuance of such order the administrator appeared in open court, with William H. Hanna as his security, and they executed an additional bond, in the same penalty as the bond in suit ; that the same was approved by the court, and by means thereof, Moore, the obligor in the original bond, was released.

This plea avers no facts which constitute a bar to this suit, and the demurrer should have been sustained.

The bond referred to in the plea, was executed under sec. 78, and not sec. 79, of the Statute of Wills. There is marked difference between the two sections.

Section 78 provides, that if the security of any executor or administrator originally was not good, or if the same should become insufficient, the court, upon the application of a distributee, creditor or other person interested in the estate, might require other and sufficient security, and in default that the letters should be revoked.

By no distortion of language can we construe this section, as intended to weaken or in any manner affect the original bond, or to discharge the obligors. There are no words, express or implied, which would justify the construction. The language is, "other and sufficient security" shall be required. There is not a word, not an intimation, that this additional bond shall operate as a discharge of the original bond. In

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Opinion of the Court.

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the absence of the express enactment of the legislature to that effect, so to hold would be unwise and odious judicial legislation.

Section 79 has also been cited by counsel. That section provides, that upon the application of the securities of executors or administrators, alleging mismanagement of the estate, the court may require them "to give good counter security to save them harmless, or to give a new bond, and such new bond shall have relation back to the time of granting letters," etc.

Under sec. 78, a distributee, creditor, or other person interested in the estate, may act.

Under sec. 79, only the securities can make the application.

In the former, it is not said that the liability under the new bond shall relate to past transactions.

In the latter, it is expressly provided, that the new bond shall have relation back to the granting of letters, and makes the bond as effectual as if it had been executed before the letters were granted.

Hanna, the security upon the new bond, was not a security upon the original bond, and had no right to make the application under sec. 79.

The case of the *People v. Lott et al.* 27 Ill. 215, has been referred to in support of the plea.

In that case the application was made by one of the sureties of the administrator, and the reasoning of the court is entirely applicable to sec. 79.

The bond set up in the plea in this case, is merely an additional bond under sec. 78, and presents no bar to recovery.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

AUGUST RICHARD

v.

SILAS BENT.

COVENANTS FOR TITLE, *pass to remote grantee*. A remote grantee of lands may maintain an action in his own name against the original grantor, on a covenant in the deed of the latter, "that the said lands are free from all incumbrances," where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee. Although in such case the covenant is nominally broken on the execution of the deed, the rule of the common law, that *chooses in action* are not assignable, does not apply.

APPEAL from the Circuit Court of St. Clair county ; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action of covenant, commenced June 18, 1869, by Silas Bent against August Richard, to the October term, 1869, of the St. Clair Circuit Court. The declaration alleges that defendant, on the 20th of September, 1867, by his deed of that date, conveyed to one Elisha P. Freeman, of the city of St. Louis, and State of Missouri, a certain tract of land lying in the said city of St. Louis ; that in and by said deed defendant covenanted with said Freeman, that said premises were free from all incumbrances, and that defendant would warrant and defend the title and possession of said real estate to said Freeman, his heirs and assigns, against the claim of any person whomsoever, against said premises ; that on the 23d of September, 1867, said Freeman conveyed said premises to the plaintiff ; that said Freeman, immediately after making the said conveyance to the plaintiff, took the benefit of the bankrupt law, and became, and still is, totally insolvent ; that at the time of executing said deed by defendant to said Freeman, said premises were not free from all incumbrances, nor could plaintiff, as assignee of said Freeman, lawfully possess or quietly enjoy said premises free from all incumbrances ; that defendant has not warranted and defended said premises to the

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Opinion of the Court.

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plaintiff, &c; that defendant has not protected plaintiff, &c., but that, on the contrary, at the time of date, sealing, &c., the taxes for the years 1867 and 1868 were a lien upon said real estate, and according to the laws of the State of Missouri, the taxes for both of said years were at the date, &c., of said deed to said Freeman, legally chargeable to defendant; that, on the 21st of October, 1868, said real estate was sold by the proper revenue officer for \$141.22, being the amount of the State, county, &c., taxes for the year 1867, to one F. C. Koenig; that in order to prevent the title to said real estate from passing into said Koenig, plaintiff was legally compelled to, and did, on June 15, 1869, pay the said Koenig the sum of \$290 to redeem said real estate from said tax sale; that, in order to protect the title to said real estate, and prevent the same from passing from the plaintiff, he did, on the 15th of June, 1869, pay to the proper revenue officer of said St. Louis county, \$129.39, the same being the amount of the State, county, and school taxes for 1868; that he has paid, to protect his title and possession, the sum of \$419.39, and concludes, that defendant has not kept his covenants, but has broken the same, to plaintiff's damage of \$500. A trial by the court resulted in a judgment for the plaintiff, from which the defendant appeals.

Messrs. KASE & WILDERMAN, for the appellant.

Mr. JAMES M. DILL, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The question made on the present record is, whether this action lies by a remote grantee against a remote grantor, upon the covenant against incumbrances in the deed of the latter, it being in this form: "that the said lands are free from all incumbrances."

The position taken by the appellant is, that this covenant is in the present tense; that there was a breach of it as soon as the deed was executed by the defendant to Freeman, the covenantee; that a right of action for the breach of the covenant immediately

accrued in favor of Freeman; that this right of action was a *chose in action*, and, like all other *chooses in action*, could not be so assigned as to enable the assignee to bring an action in his own name; that an assignee can not sue upon a breach of contract that happened before his time.

And the weight of American authority is undoubtedly in favor of the position, that the covenant against incumbrances, in the form of the one in question, being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an heir, a devisee, nor a subsequent purchaser. And it is the same with the covenants of seizin and right to convey, they also being covenants *in presenti*, and broken, if at all, when the deed is delivered. But English decisions hold a contrary rule, as well as those of some of the States.

The question, can an executrix sue for a breach of the covenant of seizin, without showing some special damage to have accrued to the testator, came before the court of King's Bench, in 1813, and was decided in the negative.

Bayley, Justice, said that the testator might have sued in his lifetime, but having forborne to sue, the covenant real, and the right of suit thereon, devolved, with the estate, upon the heir. *Kingdon v. Nottle*, 1 M. & Selw. 355.

The case of *King v. Jones*, 5 Taunt. 418, involved the same principle. The grantor covenanted with the grantee and his heirs, to do all lawful and reasonable acts for further assurance, upon request. The request was afterwards made by the grantee and refused by the grantor. The grantee died, not having sued for the breach, and not having been evicted. His heir, who was the party evicted, brought a suit for the breach of covenant, and the court sustained it. The covenantee, it was said, paid his purchase money, relying on the vendor's covenant; he required him to perform it, but gave time, and did not sue him instantaneously for his neglect, but waited for

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Opinion of the Court.

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the event. It was wise so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. And this judgment was affirmed on writ of error to the King's Bench. *Jones v. King*, 4 Maule & Selw. 188. The covenant being one for further assurance on request, the technical breach of it occurred upon the refusal to execute the further assurance on request, and the case presents the same question as that arising on the covenant of seizin.

The case first cited, *Kingdon v. Nottle*, came up again, when the same plaintiff sued *as devisee* of the covenantee, on the covenant of seizin.

It was argued that the covenant was broken as soon as made, and therefore no right of action passed to the devisee. The Chief Justice, in that case says: Here the covenant passes with the land to the devisee, and has been broken in the time of the devisee, for so long as the defendant has not a good title, there is a continuing breach, and it is not like the covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime; but, according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate. *Kingdon v. Nottle*, 4 M. & Selw. 53.

With regard to such breaches of real covenants as occurred in the lifetime of the ancestor, but occasioned him no actual damage, or, after his death, the action should be brought in the name of his *heir*, or his *devisee*. 1 Chit. Pl. 24, and see Fitzherbert's N. B. 341-6, 3 Wentworth's Pleading, 440, Rawle Cov. for Title, 3 ed. 337, et seq. and 352, note 1.

The States of Indiana, Ohio, South Carolina and Missouri, appear to have adopted the same doctrine as the English courts. *Martin v. Baker*, 5 Blackf. 232; *Backus v. McCoy*, 3 Ohio, 211; *Foote v. Bennett*, 10 id. 312; 17 id. 52, *Devore v. Sunderland*; *McCrady v. Brisbane*, 1 Nott & McCord, 104; *Dickson v. Desire*, 23 Mo. 152; *Chambers v. Smith*, id. 179.

In one of the earlier cases in Massachusetts, *Stinson v. Sumner*, 9 Mass. 143, the assignee of one who had received a covenant against incumbrances, was allowed to recover upon it without question as to his right. In another case, in the same court, in pronouncing upon such a covenant, Mr. Justice WILDE, who delivered the opinion, after acknowledging the rule of the common law, that *choses in action* are not assignable, and that it must be held binding, held the following language: "But we are not disposed to apply it (the rule) to cases not coming within the reason of the rule; and we are inclined to the opinion that the present is a case of that description. There was a breach of the covenant, it is true, before the assignment, but for this breach Hitchings (the covenantee) could only have recovered nominal damages. The actual damages accrued after the assignment. They were sustained by the plaintiff, and not by Hitchings. \* \* \* It seems to me that, if the present case required a decision upon this point, we might be well warranted in saying that the covenant against incumbrances, notwithstanding the breach, passed to the assignee, so as to entitle him to an action for any damages he might sustain after the assignment, because the breach continued, and the ground of damages has been materially enlarged since that time, so that the plaintiff's title does not depend upon the assignment of a mere *chose in action*." *Sprague v. Baker*, 17 Mass. 536. But afterwards, the technical rule denying the action to an assignee, was adhered to, and may be considered as the settled one in that State.

Chancellor KENT, in referring, in his Commentaries, to the principle as settled by the American cases, remarks that, it is to be regretted that the technical scruple that a *chose in action*



was not assignable, does necessarily prevent the assignee from availing himself of any or all of the covenants. He is the most interested, and the most fit person to claim the indemnity secured by them, for the compensation belongs to him, as the last purchaser and the first sufferer. 4 Comm. 557.

No English decisions in regard to the particular covenant against incumbrances are cited, as in England that covenant, unlike ours, is prospective in its operation, being usually connected with the covenant for quiet enjoyment, as, that the purchaser "*shall enjoy, &c., and that free of all incumbrances,*" &c. But the rule which allows the action in the name of the assignee of the covenant of seizin, applies with much greater force in the case of the assignment of the covenant against incumbrances.

Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all, actual damage and all the damages that can result from the breach have accrued; the measure of damages is the purchase money and interest, which are at once recoverable. In such case, the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *choses in action*.

But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action*.

The appellee does not claim to make his title to sue, by means of the purchase of a *chose in action*. The subject of his purchase was a lot of ground; the covenant is claimed to be annexed to the real estate; that it ran with the land and passed to him, not by direct operation of assignment, but as an

incident to the land. The right of suit for nominal damages, which Freeman had against the appellant, was no matter of consideration between the parties, at the time of the purchase, but it was regarded that, in case the purchaser of the land should sustain any actual damage by reason of a prior incumbrance, the covenant would then be to him a means of indemnity.

It would seem to be a case not coming within the reason of the rule prohibiting the assignment of *choses in action*, as the court were inclined to think in *Sprague v. Baker*, *supra*. What is the temptation to buy up mere nominal rights of action, or the danger therefrom, "lest there should be multiplying contentions and suits."

Mr. Rawle, in his work on Covenants for Title, observes that, it is somewhat remarkable that the cases of *Lucy v. Levington*, 2 Lev. 26, and *Lewis v. Ridge*, Cro. Eliz. 863, which have been referred to by American courts in support of the rule, that the covenants of seizin, and against incumbrances, are not assignable, do not at all appear to support the position for which their authority is relied upon. Rawle on Cov. 348. And they seem to decide no more than that *after total breach* the covenant becomes a *chose in action*, and incapable of transmission or descent. And a distinction between the former cases of *Lucy v. Levington*, and *Lewis v. Ridge*, and the later ones of *Kingdon v. Nottle* and *King v. Jones*, appears to be, that, in the former, it was held that covenants, after a substantial breach, would not run with the land; in the latter, that, after a mere nominal breach, they might. As the doctrine of covenants running with land is an exception to the common law rule that *choses in action* are not assignable, why limit its sphere of usefulness, and confine it to those covenants which may be broken in the future? May it not as well extend to such as have only been nominally broken at the time of assignment, and the substantial breach occurs afterwards, and the whole actual damages are sustained by the assignee?

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It does not appear to be a sufficient answer, that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in the name of the assignor for his use.

That is a cumbrous form of remedy, and the remedy is liable to be embarrassed. In the case in hand, such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy of Freeman, and to establish the right of action in such assignee, might be a serious inconvenience.

If it be held that the real cause of action on such a covenant, accrues immediately upon the making of the deed, it would seem that the statute of limitations would then commence to run, when the breach was only formal, and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterwards, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises, and the substantial breach takes place, the statute of limitations may have run against the action.

In the state of the authorities, not feeling embarrassed by any former decisions of our own upon the point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form, for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule, only in supposed obedience to the strict technical common law rule.

We hardly feel called upon to be more rigid in adherence to a merely technical rule of the English common law, than the English courts themselves.

Although, then, according to the letter, this covenant against incumbrances was broken immediately on the delivery of the deed from the appellant to Freeman, yet, as the latter never removed the incumbrance, nor suffered any damage therefrom, we hold that the right of action for the breach of the covenant

## Syllabus.

passed to and vested in his grantee, the appellee, who sustained the whole actual damage, by paying the taxes and removing the incumbrance.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

THOMAS OARD *et al.*

v.

ELIJAH OARD.

1. RESCISSION OF CONTRACT—*for withholding the consideration.* A father, upwards of seventy years of age, induced by the promise of his son to support him and his almost equally aged wife, in comfort during the remainder of their lives, conveyed his farm to his son's wife, and transferred to his son all his personal property. The son took possession of the farm, and by his continued unkindness and ill treatment, in little upwards of a year compelled his parents to leave and take refuge with another child. Upon bill filed by the father to rescind the contract, it was *held*, if the rescission of the contract in cases of such character, could not be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent.

2. And in this case, no accident or misfortune, or unforeseen event of any kind having prevented the son from executing his agreement, and the record disclosing no provocation of any sort, nor any attempt at justification, the inference was regarded as unavoidable, that the son procured the deed from his father with intent to treat him in the manner he did.

3. DECREE *in favor of the "defendants," when all are not entitled.* Where a grantor of land sought by bill in chancery to rescind the deed, making his grantees, and also a tenant in possession, parties defendant, and a decree was rendered setting aside the conveyance, but directing that the complainant pay to the "defendants" a certain sum for improvements: *Held*, as all the defendants would, by the terms of the decree, be entitled to participate in the sum so directed to be paid, when the tenant was not entitled to any part of it, the decree was, to that extent, erroneous.

WRIT OF ERROR to the Circuit Court of Jefferson county;  
the Hon. JAMES M. POLLOCK, Judge, presiding.

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Opinion of the Court.

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Mr. C. H. PATTON and Mr. G. WRIGHT, for the plaintiffs in error.

Messrs. TANNER & CASEY, and Mr. JACOB K. ALBRIGHT, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This case, in all its essential features, is like *Frazier v. Miller*, 16 Ill. 49, and falls within the authority of that decision. A father, upwards of seventy years of age, induced by the promise of his son to support him and his almost equally aged wife, in comfort during the remainder of their lives, conveyed his farm to his son's wife, and transferred to his son all his personal property. The son took possession of the farm, and, by his continued unkindness and ill treatment, in little upwards of a year compelled his parents to leave and take refuge with another child. This bill is brought by the father to rescind the contract, and the circuit court so decreed.

Cases of this sort are rare in our books, as, fortunately for our common humanity, they are rare in actual life. But, as was said by this court in *Frazier v. Miller*, *supra*, when they do occur they appeal so strongly to the conscience of the court for relief, that if the rescission of the contract can not be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent.

On the evidence in this record, such a presumption is not merely reasonable but irresistible. No accident or misfortune, or unforeseen event of any kind, has prevented the son from executing his agreement. His refusal shows not only a wanton disregard of the obligations of a contract, more binding upon the conscience than almost any other that could be made, but a degree of filial inhumanity rarely seen. As the record discloses no provocation of any sort, nor any attempt

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Syllabus.

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at justification, the inference is unavoidable, that the son procured the deed from his aged father for the very purpose of doing precisely what he has done. The transaction was a gross abuse of the confidence reposed by the almost imbecile parent in his son, and is tainted throughout by a fraudulent intent, which ripened into a wicked consummation. The circuit court properly pronounced a decree rescinding the deed.

There is, however, a minor error in the decree, doubtless the result of inadvertence, which needs correction. Pettijohn was made a party to the suit, as tenant in possession. He seems to have had no other interest. The decree requires the complainant to pay to the defendants the sum of \$218.00, designed, we presume, as compensation for improvements. As this payment is to be made to the defendants generally, without naming which of them, Pettijohn would be entitled to claim his share of the money, although we presume the court did not design any should be paid to him. In order that the decree may be modified, the cause will be remanded. The court below divided the costs in that court, and they will be divided here, one half to be taxed against plaintiffs in error, and one half against the defendant in error.

\* *Decree modified.*

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JOSEPH KUHNER

v.

ANTHONY GRIESBAUM.

**NEW TRIAL**—*verdict against the evidence.* In this case the verdict of the jury is not sustained by the evidence, and the judgment is, for that reason, reversed.

**APPEAL** from the Circuit Court of Clinton county; the Hon. SILAS L. BRYAN, Judge, presiding.

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Opinion of the Court.

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Mr. F. A. LIETZE, for the appellant.

Mr. G. VAN HOOREBEKE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellee, in the Clinton circuit court, against appellant, to recover damages for an alleged obstruction, by which water is so dammed up as to spread over and injure the lands of appellee. A demurrer was filed to the declaration, but was overruled by the court, whereupon defendant filed the general issue. A trial was had by the court, and a jury, who found the issue for the plaintiff, and assessed damages at \$100. A motion for a new trial was entered, but it was overruled by the court, and judgment rendered upon the verdict, from which defendant prosecutes this appeal.

It appears from the evidence, that the parties own adjoining farms, appellee's to the west and appellant's to the east. It appears that on a corner of appellee's land, adjoining appellant's, there is a small pond, surrounded by low, flat ground, and that when there is a large quantity of water on the surface of the earth, either from rain or melting snow, it accumulates from the north, east and south, in the pond, which fills, and the water then spreads over the adjacent low and level ground. It clearly and unmistakably appears, from the evidence, that the water naturally flows westward, and would continue to do so if not obstructed. This is proved by a large number of witnesses who have known the premises many years, some of them more than a quarter of a century. Opposed to this evidence, appellee has introduced scarcely anything to rebut the clear and satisfactory evidence that the water naturally runs to the west, and even some of his own witnesses so testify.

From the evidence, this can not be a matter of conjecture. The ground was tried by a level, by the county surveyor, who found the inclination in the ground westward twenty-four inches in the length of twenty chains, and eighteen inches in

4—59TH ILL.

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Opinion of the Court.

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the next ten chains, where it enters a deep ravine. In leveling eastward, the first eight or nine chains from the pond was found to be very nearly level, but in the next eleven or twelve chains, the ground rises fourteen inches, and from thence eastward it continues to rise. The evidence of the surveyor is fully corroborated by his assistant; and in addition to their evidence, a large number of persons testify that they have long known the ground, and they all concur in saying that the water naturally runs to the west. This being true, and the evidence seems to establish the fact beyond all doubt, it is impossible that a dike or embankment erected on appellant's land should flow water back on appellee. Water must and will obey the laws of gravity, and run down hill. It is, no doubt, true, as stated by some of the witnesses, that it could be made to run eastward by a ditch five or six feet deep. But until a ditch of that depth shall be formed, it can not pass off in that direction. Again, it appears that appellee has a road on his east line and adjoining the land of appellant, thrown up above the level; and the evidence all concurs to establish the fact that there is no obstruction on appellant's land, but it is upon appellee's own ground, and seems to have been placed there before he purchased the farm, and was placed there with the knowledge and approval of the former owner. Inasmuch as the water naturally flows to the west, appellant is under no moral or legal obligation, by ditches or otherwise, to drain the water which accumulates upon appellee's land over his own. The law does not require it, and it would be unjust if it did. The evidence shows that a person, in a half of a day, could remove all obstructions, so as to permit the water to flow westward in its natural course. The evidence fails to sustain the verdict, and the court below should have granted a new trial.

For the error in overruling the motion for a new trial, the judgment of the court below must be reversed, and the cause remanded for further proceedings.

*Judgment reversed.*



GUY S. WILSON

v.

HUNTER GARRARD.

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| 178 | 17  |
| 50  | 51  |
| 83a | 485 |

1. PARENT AND CHILD—*whether former liable for torts of the latter.* A father is not liable for the torts of his children, committed without his knowledge or consent, and not in the course of his employ.

2. INFANTS *are liable for torts and wrongs committed by them, the same as adults.*

3. RIGHT OF WAY *over the land of another.* In an action for the trespasses of the defendant's children in passing over the land of the plaintiff, in going to and returning from school, it appeared the school house was built by and for the public, on a small lot forming a part of the tract owned by the plaintiff. The children could not conveniently, and without traveling a very considerable distance, approach the school house without passing over the plaintiff's land: *Held*, until a highway to the school house was provided, the children, they residing in the district, had the right, necessarily, to travel over the land of the plaintiff in going to and returning home from school.

4. LICENSE *to pass over the land of another.* And if there were a highway, it appearing, from the evidence, that the defendant's children were permitted by the plaintiff to pass over his land for four or five years, without objection, the jury had the right to infer therefrom a license, which could not be revoked without notice.

APPEAL from the Circuit Court of Crawford county; the Hon. HIRAM B. DECIUS, Judge, presiding.

Mr. J. C. ALLEN, for the appellant.

Mr. E. CALLAHAN, for the appellee.

Per CURIAM: This suit was commenced before a justice of the peace, for the trespasses of the children of appellee, in passing over the land of appellant, in going to and returning from school, and for worrying and maltreating the hogs of appellant.

A father is not liable for the torts of his children, committed without his knowledge or consent, and not in the course of his employ.

In this case, the acts of the children towards the hogs were wholly wilful, and not by the direction or with the assent of

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Opinion of the Court.

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the father. Infants are liable for torts and wrongs committed by them, the same as adults. It would be unjust to hold the father responsible for the purely mischievous and wilful conduct of the children, as shown by this record.

In regard to the trespass upon the land, there is evidence tending to show license and permission by appellant, to pass over his land. The children had traveled over it for four or five years before the institution of this suit, with the knowledge of the owner.

The school house was erected on a small lot, forming a part of the tract owned by appellant. The children of appellee could not, conveniently, and without traveling a very considerable distance, approach the school house without passing over the land of appellant. The house was built by and for the public, and the children of the district ought to have the right of ingress and egress to and from it. The jury might fairly imply a license. Such license might be revoked, if there was a public highway to the school house. If there was none, the children had the right, necessarily, to go to and return home from the school house, and to travel over the land of appellant, until a highway was provided.

The children did not go upon the land after notice to appellee, for the suit was commenced on the same day on which the notice was given.

The instruction complained of was correct. It informed the jury that, if the children of appellee were permitted by the appellant to go over the land, without objection, the jury might infer therefrom a license, which could only be revoked by notice. This is the law, and there was sufficient evidence upon which to base it. The evidence clearly shows that these children were permitted—suffered—to pass over the land for years, without any objection. The fact was known to appellant. The reasonable implication is, a license to the children to enter upon the land. Appellant can not be allowed to repudiate the necessary result of his own conduct.

The judgment is affirmed.

*Judgment affirmed.*

GEORGE W. COCHRAN

v.

GREEN L. CHITWOOD *et al.*59 53  
31a 270

1. **PRINCIPAL AND AGENT**—*warranty by the latter*. An agent, acting under a general authority from his principal to make the sale, sold to another two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase money: *Held*, the principal was bound by any warranty of the agent, to the purchaser, in regard to the soundness of the mules.

2. **BREACH OF WARRANTY in part, as to personal property—recovery of purchase price**. In an action on a promissory note, given for the purchase money of two mules, as a defense thereto the defendant set up an alleged warranty, by the plaintiff, that the mules were sound, averring that they were unsound and by reason of which they both died. The evidence established the fact, that one of the mules was sick before the sale, but as to the other there was some doubt as to whether there had been anything the matter with it at the date of the sale. The defendant not having offered to return the property and rescind the contract, on the ground of the deceit practiced, an instruction which directed the jury in case there was a warranty, that if either of the mules was sick they should find for the defendant, was regarded as erroneous, inasmuch as it did not follow, that if one of the mules was unsound the plaintiff could not recover for the other, if sound, notwithstanding the warranty.

WRIT OF ERROR to the Circuit Court of Marion County ;  
the Hon. R. S. CANBY, Judge, presiding.

Mr. D. C. JONES, for the plaintiff in error.

Mr. W. W. WILLARD and Mr. H. C. GOODNOW, for the  
defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was an action of assumpsit, brought on a promissory note. The defense sought to be interposed is, that there was a failure of the consideration for which the note was given. It was given to secure the purchase money of a pair of mules, sold by the agent of the plaintiff to the defendant Chitwood. It is alleged, that the agent of the plaintiff warranted the

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Opinion of the Court.

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mules to be sound, when, in fact, they were not sound, and by reason of the unsoundness, they both died shortly after they were sold to the defendant.

There is a conflict of evidence as to whether there was, in fact, any warranty as to the soundness of the mules, at the time of the sale. We think, however, that the evidence on that question greatly preponderates in favor of the defendants, and fully sustains the finding of the jury.

It is insisted that Delano, the agent of the plaintiff, had no authority to make the warranty, and if any was made, the plaintiff was in no way bound by it.

The facts in the case are briefly these : The plaintiff owned a farm in Marion county, but did not reside on it. Delano was his managing agent on this farm, and had charge of the stock. He was fully authorized by De Pew, the plaintiff's general agent, to make the sale, and plaintiff subsequently ratified the sale by accepting the note. It would be inequitable to permit the plaintiff to ratify so much of the contract as was favorable to his interest, and to repudiate that which was unfavorable. The agent was acting under a general authority, and we must regard the acts of the agent as the acts of the principal, and under the circumstances proven, hold, that the plaintiff is bound by any warranty that was made by his agent, in making the sale. *Markle v. Haskins*, 27 Ill. 382.

The only doubtful question presented by the facts in the case is, whether the mules were *both* unsound at the time of the sale.

As to one of them there can be no doubt. The evidence abundantly establishes the fact, that one of them was sick before the sale, and that the agent of the plaintiff knew it. In regard to the other one, there is some doubt, upon the evidence contained in the record. It does not clearly appear, that there was anything the matter with it at the date of the sale.

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Syllabus.

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In view of the evidence, we think the third instruction given for the defendants, was erroneous.

The jury were instructed, that "if they believe, from the evidence, that the mules, or *either of them*, were sick while in possession of Cochran, and it was known to Cochran, or his agent, when he sold the mules to the defendant, and he told the defendant that they were sound, and the defendant purchased the mules, relying upon the soundness of the mules, it would be a fraud on the defendant, and Cochran was bound by it if he afterwards sanctioned the contract, and they should find for the defendant."

This instruction does not state the law correctly, as applicable to the facts of this case. The jury were told, that "*if either*" of the mules was sick they should find for the defendants.

There was no offer to return the property and rescind the contract on the ground of the deceit practiced on the defendant, but he chose to retain it, and it does not follow that if one was unsound the plaintiff could not recover for the other, if sound, notwithstanding the warranty. Such an instruction was calculated to, and we have no doubt did, mislead the jury on the evidence in the case.

For the error indicated, the judgment will be reversed and the cause remanded.

*Judgment reversed.*

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STEPHEN S. HALL

v.

JOHN D. FREEMAN.

1. ASSIGNMENT of promissory note—proof of, when necessary and when not. At the common law, in an action on a promissory note by an assignee thereof against the maker, the plaintiff is required to prove that the indorsement was made by the person by whom it purports to have been

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Syllabus. Opinion of the Court.

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made, and where the indorsement is special, that the indorsee is the person described in it.

2. Though, when the handwriting of the indorser is proved, possession of the note might be *prima facie* evidence of ownership.

3. The 59th section of the Practice Act (R. S. 421), which declares that "in actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignment or the signature of any assignor, unless the fact of assignment be put in issue by plea, verified by the affidavit of the defendant, or some credible person, stating that he believes the facts stated in the plea are true," does not apply, unless the plaintiff declares specially upon the instrument.

APPEAL from the Circuit Court of Jackson county; the Hon. M. C. CRAWFORD, Judge, presiding.

Messrs. ALLEN, MULKEY & WHEELER, for the appellant.

Mr. U. E. ROBINSON, and Mr. T. B. TANNER, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee against appellant, in the Jackson county circuit court. The case was tried by the court, without a jury, upon the common counts and the general issue. There had been a special count upon a promissory note, but the court sustained a demurrer to it, and appellee's counsel went to trial upon the common counts alone. He offered in evidence a promissory note, made by appellant, whereby he promised to pay Joseph Benoist, or order, \$1500 one day after date, for value received. The note purported to have been specially indorsed by the payee to John Nevins, or order; by Nevins to Shapleigh & Co. or order, and by the latter to appellee. Appellant's counsel objected to the note as evidence, without proof of the genuineness of the indorsements. The court overruled the objection, admitted the note in evidence without such proof, and gave appellee judgment for the amount found due upon it. Exception was taken to this ruling, and the case brought here by appeal.

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Opinion of the Court.

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In such cases, the rule at common law is, that the indorsement is to be proved in the ordinary mode, like other handwriting. The plaintiff is required to show that the indorsement was made by the person by whom it purports to have been made, and when the indorsement is special, that the indorsee is the person described in it. 3 Phil. Ev. (6th Am. Ed.) 189. When the handwriting of the indorsers is proved, possession of the note might be *prima facie* evidence of ownership.

The plaintiff below was subject to the requirements of this rule, unless relieved by the 59th sec. of the Practice Act (R. S. 421), which declares that, "in actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignments or the signature of any assignor, unless the fact of assignment be put in issue by plea, verified by the affidavit of the defendant, or some credible person, stating that he believes the facts stated in the plea are true."

That this statute was intended to apply only to cases where the plaintiff declares specially upon the instrument, seems to admit of little question. It is only when the note is declared on, that the action may be said to be upon it. *Peake v. The Wabash Railroad Co.* 18 Ill. 88.

When it is introduced under the common counts, it is offered as evidence of the general duty to pay, and is but evidence. Any of the presumptions which the writing affords, when so offered, may be contradicted by other evidence, and the jury must draw their conclusion of fact from the whole evidence. 3 Phil. on Ev. 186.

This conclusion is strongly supported by the language of the statute itself. In actions upon bonds, notes, etc., made assignable by law, brought in the name of the assignee, the plaintiff shall not be bound to prove the signature of the assignor, "unless the fact of the assignment be put in issue by plea," etc.

## Syllabus.

Thus it must be an action upon an instrument assignable by law, brought in the name of the assignee, and in which it is practicable to put the fact of the assignment in issue by plea. When a plaintiff files a declaration in the common counts alone, and attaches the copy of a note, the defendant can not plead to the note, he must plead to the counts.

An issue of fact is formed by the allegation of a matter of fact by one party, and a denial of it by the other. How could the defendant, by a plea to the common counts, put in issue the fact of the assignment of an instrument, when no such fact is either alleged, or implied from anything that is alleged in the counts?

We are satisfied that the court erred in admitting the note in evidence, and giving judgment against appellant upon the evidence, without proof of the signatures of the assignors.

For this reason the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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JOEL G. MORGAN *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS,  
for the use of Thomas Lewis.

1. EXECUTION—*who may control it.* An execution is the process of the plaintiff therein; and he has the right to control it without any interference on the part of attorney or officer.

2. OFFICER—*liability for disregarding instructions of plaintiff in execution.* Where an officer sells property contrary to the instructions of the plaintiff to suspend the sale, he thereby incurs a liability to the defendant in the execution, for the damage sustained by reason thereof.

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| 29a | 228 |
| 29a | 318 |
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| 50a | 600 |
| 59  | 58  |
| 66a | 361 |
| 66a | 628 |



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Syllabus. Opinion of the Court.

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3. So, it is no answer to the declaration, in an action of debt on a sheriff's bond, where the breach assigned is, that the officer sold property of the defendant in the execution, after being ordered by the plaintiff to suspend the sale, that the property was so sold by virtue of such execution, in the hands of the officer, against the goods and chattels of said defendant.

4. Nor is it a defense that the sale was so made by direction of the plaintiff's attorney, it not appearing but that the attorney may have violated the orders of the plaintiff.

5. *SAME—receiving instructions by telegraph.* It is competent for the plaintiff in an execution, to direct the sheriff by telegraph, to suspend a sale thereunder.

6. *EVIDENCE—telegraphic dispatch.* In such case, the telegram delivered to the sheriff at the end of the line is the original message—is evidence of its contents, and obligatory upon the officer.

7. The question as to what is the original message, depends upon whose agent the telegraph is. Where the party sending a message is the responsible party, and sends a message for the purpose of giving directions to be acted upon, then the message delivered at the end of the line is the original.

APPEAL from the Circuit Court of Alexander county ; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. ALLEN, WEBB & BUTLER, for the appellants.

Mr. D. T. LINEGAR, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

The declaration, in this case, was in debt, on a sheriff's bond.

The pleas were, *non est factum* not sworn to ; second, that the sheriff was not ordered to suspend the sale ; third, that the sheriff had an execution against the goods and chattels of Lewis, by virtue of which he sold the property, according to law, as he lawfully might ; fourth, that the sheriff sold the property by the order and direction of the attorney of the plaintiff.

A demurrer was sustained to the third and fourth pleas.

Was it error to sustain the demurrer ? The answer must depend upon the character of the breaches assigned.

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Opinion of the Court.

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The declaration avers, that the sheriff had an execution in favor of Boyer, and against Lewis, by virtue of which he levied upon certain shares of stock, and advertised a sale on the 29th day of October, 1867; that the defendant in the execution paid off and satisfied the same on the 28th of October, except the costs, and that, prior to the sale, the plaintiff in the execution ordered a suspension thereof, and that the sheriff refused to suspend, and sold stock of the value of \$5,000.

The third and fourth pleas do not answer the declaration.

Pleas in bar must show that the plaintiff has no cause of action. They should answer the gist of the action. They must deny, or confess and avoid the facts stated in the declaration. 2 Saund. Plead. 646, *et seq.*

The gist of this action—the true issue—was, whether the plaintiff had ordered the sheriff to suspend the sale. These pleas constitute no justification of the breach, nor do they confess and avoid it.

An officer might proceed strictly in accordance with the law governing the conduct of an execution in his hands, and yet be guilty of the breach assigned. He may have an execution in due form; levy it upon property liable to seizure; make proper advertisement of a sale, and fully comply with the formal requirements of the law; yet, if he should sell in utter disregard of the instructions of the plaintiff, he incurs a liability to the defendant in the execution.

The third plea does not, then, traverse the material portion of the breach.

The fourth is no better than the third plea.

The breach is, that the plaintiff suspended the sale; the plea is, that the attorney directed it; but *non constat* that he may not have violated the orders of the plaintiff.

The execution is the process of the plaintiff, and he has the right to control it without any interference on the part of attorney or officer. *Reddick v. Administrators of Cloud*, 2 Gilm. 670.

The demurrer was rightly sustained.

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Opinion of the Court.

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It is insisted, that the refusal of the court to permit Wheeler, an attorney, who had some supervision over the execution, to detail the instructions given to the officer, by him, on the morning of the sale, was error.

Prior to the sale, the officer had received a letter from the attorney of record, and a telegram from the plaintiff, to return the execution satisfied. The proof is conclusive, that a stay of the sale was ordered by the plaintiff; and this was known by the officer as well as Wheeler, before the sale. The officer should not have been governed by any instructions emanating from Wheeler, under the circumstances; and Wheeler should not have given any directions in opposition to the letter and telegram.

The alleged error, if it was one, was error without prejudice, and should not reverse.

Error is assigned upon the refusal of the court to give the 6th, 7th, 8th and 9th instructions, asked by appellant.

The 6th is, substantially, that though the sheriff received the telegraphic dispatch, yet it was not evidence upon which he was bound to act and postpone the sale.

The 9th is, that the dispatch received at the office to which it was sent, is not legal evidence of its contents.

The argument of counsel is so very concise, that we do not know that we apprehend his objection.

The 6th instruction seems to assume, that directions to officers to control them in the performance of their duties, can not be given by telegraph, so as to be obligatory upon them.

In this age of telegraphs—when by means of them important contracts are concluded every day—thousands of dollars transferred from one to another—and, indeed, a large portion of the commerce of the country carried on—it is too late to urge the objection that officers can not be directed by telegraphic communication. The objection would apply, with equal force, to a communication by mail.

In this case, the original was identified and read to the jury, and it was competent evidence of its contents.

## Syllabus.

The case of *Matteson v. Noyes*, 25 Ill. 591, merely decides that a copy of a telegram is not evidence, but that the original must be produced.

The question arises, what is to be regarded as the original, in the case at bar? This depends upon whose agent the telegraph is. Where the party sending a message is the responsible party, and sends a message for the purpose of giving directions to be acted upon, then the message delivered at the end of the line, is the original. *Redfield on Car. &c.*, 400; *Durkee v. Vermont Central Railway*, 29 Vt. 127.

The telegram in this case, delivered to the sheriff at the end of the line, was the original message; was evidence of its contents; and the officer was bound to act upon it. He had full notice of the wish of the plaintiff to suspend the sale.

The 7th instruction is to the effect, that the market value of the stock levied on and sold, is to be determined by the preponderance of the evidence. This is substantially embraced in the 4th instruction, which was given for appellant.

The 8th instruction refused, is identical with the 5th, given for appellant.

A court should not confuse the jury, nor encumber the record, by a repetition of instructions.

The several errors are not well assigned, and the judgment must be affirmed.

*Judgment affirmed.*

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23a 217

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DANIEL L. GOLD

v.

JOSEPH S. JOHNSON.

1. DISSOLUTION OF INJUNCTION—in what manner effected—striking cause from the docket. A suit restraining by injunction the collection of a judgment, was commenced and the writ served in June or July of 1857. The

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Syllabus. Statement of the case. Opinion of the Court.

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case was continued, from term to term, until the September term of 1862, when the following order was made: "Ordered that this cause go off the docket." On the 14th of March, 1867, execution issued upon the judgment and was levied on property of the debtor, and a sale thereof made on the 18th of April following: *Held*, the order striking the case from the docket, acquiesced in, and no attempt made to reinstate the case, was a virtual dissolution of the injunction.

2. **LEVY UPON REALTY—whether a satisfaction.** A levy of an execution on real estate of value sufficient to satisfy it, does not, like a levy on personal property, operate while the levy is undisposed of as such a satisfaction of the judgment as would be a bar to any attempt to enforce the collection of the judgment in any other way. The fact that such a levy has been made, does not affect the validity of the purchaser's title to other lands of the debtor, sold under an execution subsequently issued.

WRIT OF ERROR to the Circuit Court of Lawrence county;  
the Hon. R. S. CANBY, Judge, presiding.

This was an action of ejectment, brought by Gold against Johnson, to recover certain premises. A trial by jury resulted in a verdict for the defendant. A new trial being awarded, the defendant again recovered a verdict, upon which the court entered judgment. The plaintiff brings the record to this court.

Mr. J. G. BOWMAN and Mr. B. B. SMITH, for the plaintiff in error.

Mr. A. SHAW and Mr. W. B. COOPER, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Objections were taken to the validity of the plaintiff's title in this case, derived under a sheriff's sale on execution, that the collection of the judgment on which the execution issued, was enjoined when the sale was made, and that a prior execution had been levied on real estate, which levy still subsisted.

It is sufficient to say of the first objection, that we do not find it to be founded in fact.

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Opinion of the Court.

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The writ of injunction was served in June or July of 1857, the injunction suit was continued from term to term, until the September term, 1862, when the following order was made: "Ordered that this cause go off the docket."

The execution under which the sale was made, was issued on the 14th day of March, 1867, and sale made on the 13th of April following.

The order striking the case from the docket, acquiesced in as it was by the complainant, with no attempt to reinstate the case, was a virtual dissolution of the injunction.

As to the second objection, a levy of an execution on real estate of value sufficient to satisfy it, does not, like a levy on personal property, operate while the levy is undisposed of as such a satisfaction of the judgment, as would be a bar to any attempt to enforce the collection of the judgment in any other way. *Gregory et al. v. Stark et al.* 3 Scam. 611. The circumstance, that a prior execution had been levied on other real estate, does not affect the validity of the plaintiff's title.

The first, third and fourth instructions, asked by the plaintiff and refused by the court, asserted the views here expressed.

The first and third instructions given for the defendant, were in denial of them.

In the refusing and giving of these instructions, there was error.

The alleged variances and omissions in the judgment, execution, and sheriff's deed, urged by the defendant in error, are immaterial.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

## WILLIAM PICKERING

v.

## WASDEN DRIGGERS.

CHANCERY—*jurisdiction of, to set aside sheriff's sale—laches.* Inadequacy of consideration alone, unaccompanied by other ground of interference, is rarely, if ever, held a sufficient reason for setting aside a sheriff's sale of real estate. And even if so considered, a delay of seventeen years in seeking the relief, while unexplained, would prevent the action of the court in that regard.

WRIT OF ERROR to the Circuit Court of White county ; the Hon. JAMES M. POLLOCK, Judge, presiding.

Messrs. CREBS & CONGER, and Mr. WILLIAM J. ALLEN, for the plaintiff in error.

Mr. T. B. TANNER, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

This is a bill in chancery, filed in 1866, to set aside a sheriff's sale of real estate, made in 1849, on the ground of inadequacy of consideration. The inadequacy was, no doubt, very great ; but that alone, unaccompanied by some other ground of interference, is rarely, if ever, held a sufficient reason for setting aside a sale, and certainly can never be so regarded after a lapse of seventeen years from the making of the sale. Even if the court could have given the desired relief, if asked in time, the delay alone, while unexplained, would prevent its action at this late day.

The decree of the circuit court dismissing the bill, is affirmed.

*Decree affirmed.*

WILLIAM S. SMITH, SR. *et al.*

v.

AMERICUS CORNELL *et al.*

**EVIDENCE—presumption.** A party purchased of another a lot of mules at a specified price per head. In an action by the vendor against the purchaser for the price of a portion of the mules, the rest having been paid for, the plaintiff declaring on the common counts, to which the general issue was filed, with a notice of set off, the defendant relying upon an agreement that the payment was to be settled with a third person, it was *held*, the plaintiff having proven the sale of the mules to the defendant, it devolved upon the latter to show that the purchase was not in the usual course of business, and that some special contract or agreement was made in reference to the purchase, to rebut the presumption that the money was to be paid to the vendor.

APPEAL from the County Court of Bond county; the Hon. ENRICO GASKINS, Judge, presiding.

Messrs. S. A. & A. C. PHELPS, for the appellants.

Mr. S. P. MOORE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellees, in the Bond county court, against appellants, to recover the price of a portion of a lot of mules, which were sold by appellees to appellants on the 2d day of November, 1869. The declaration contained the common counts, and to it the general issue was filed, with a notice of set off. A trial by jury was had, resulting in a verdict in favor of plaintiffs, when a motion for a new trial was entered, but overruled by the court, and judgment rendered upon the verdict, from which an appeal is prosecuted to this court, and various errors are assigned on the record.

The parties were sworn, and their evidence is in conflict as to the ownership of the property sold, and as to the payment of the purchase price. Defendants claim that five of the ten mules purchased belonged to one Jenkins, and that Cornell agreed to sell them, and let the defendants settle



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Opinion of the Court.

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with Jenkins; but this is positively and unequivocally denied by Cornell, who sold the mules to Smith, Jr. There is no dispute that appellants purchased ten mules of appellees at \$125 per head; and having proved that fact, it devolved upon appellants to prove that the purchase was not in the usual course of business, and that some special contract or agreement was made in reference to the purchase, to rebut the presumption that the money was to be paid to the vendor. Appellant Smith, Jr., testifies to a special arrangement, but Cornell denies it. Smith says five of the mules belonged to Jenkins. Cornell admits that he had mules belonging to Jenkins, but denies that he agreed to sell them to appellants, and permit them to set off the amount against their claim on Jenkins.

In this conflict of evidence, the jury have given credit to Cornell, and we fail to perceive anything in the record which indicates that they did wrong in so doing. It was their province to weigh the testimony, and give weight to such as they believed to be true, and reject such as they were unable to believe.

We are not prepared to say that they should have given credit to Smith's, rather than Cornell's, evidence. Appellants have failed, by a preponderance of evidence, to establish the special agreement relied upon, and the proof warranted the finding of the jury.

We perceive no force in the objection, that the court admitted improper evidence. The portion objected to may have been remote, but it tended to shed light upon the transaction, and was not, so far as we can see, calculated to either mislead or confuse the jury.

We find no error in the record, and the judgment of the court below is therefore affirmed.

*Judgment affirmed.*

## GEORGE SATTLE

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. **CRIMINAL LAW**—*return of indictment into open court.* Before a party can be legally tried on an indictment, it must appear from the record, that the indictment was returned by the Grand Jury into open court. Such fact not appearing in the record, a motion in arrest of judgment should be allowed.

2. **THE MINUTES OF THE JUDGE** are no part of the record, and although they show the indictment to have been so returned, that does not have the force or effect of a record.

3. **MALICIOUS MISCHIEF**—*what constitutes.* Upon the trial of a party on an indictment for malicious mischief, it appeared there was a controversy between the prosecutors and the defendant, in regard to the possession of a certain lot of ground, the defendant being in the actual possession. Upon the prosecutors attempting to run a division fence across the lot, the defendant took up the posts and tore off the boards, while the fence was in process of erection, and forbade them from making the fence, protesting they had no right to do so, and that he was paying rent for the whole of the premises: *Held*, an instruction offered by the defendant, that if the jury believed, from the evidence, he was in possession of the premises and paying rent, they should find him not guilty, should have been given. The statute in regard to malicious mischief, (R. S. Ch. 80,) does not apply to cases of this kind, where opposition is made by a claimant of premises of which he is in actual possession, to the erection of a fence across the same without his consent.

4. **VENUE**—*in criminal cases, must be proved.* The failure, in a criminal case, to prove the county in which the offense was committed, is fatal to a conviction.

WRIT OF ERROR to the Circuit Court of Clinton county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was a prosecution for malicious mischief. The indictment charges the defendant with maliciously breaking, tearing, and pulling down a plank and post fence, and destroying the same. It appears, the fence so alleged to have been torn down and destroyed, was in process of erection by the prosecuting witnesses, across a lot of ground in the actual possession of the defendant, and which he claimed he was entitled

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| 59  | 68  |
| 41s | 530 |
| 59  | 68  |
| 150 | 407 |

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Opinion of the Court.

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to as their lessee. The prosecutors contended he was only entitled to a part of the premises.

Mr. G. VAN HOOREBEKE, for the plaintiff in error.

Mr. WASHINGTON BUSHNELL, Attorney General, for the people.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an indictment in the Clinton circuit court, for malicious mischief, and a verdict of guilty and a fine imposed.

To reverse this judgment defendant brings the record to this court, assigning for error, that his motion in arrest of judgment was overruled, and the refusal of the court to give the instruction asked on his behalf.

These points we are of opinion are well taken. The record does not show that the indictment was brought into court by the Grand Jury. There is nothing tending to show this but the minutes of the judge, which he is not required to keep, and which he does keep for his own convenience merely, and have not the force or effect of a record. It is admitted, the clerk of the court made no entry on his minutes of the fact. *McCormick v. Wheeler et al.* 36 Ill. 114.

It was held by this court in *Gardner v. The People*, 20 ib. 430, that before any party can be tried on an indictment, it must appear from the record that it was returned into open court. This fact does not appear, and being absent the judgment should have been arrested.

It would appear from the evidence, there was a controversy between the prosecutors and the defendant, as to the possession of this lot, the defendant being in actual possession, and on the prosecutors attempting to run a division fence across it the defendant took up the posts and tore off the boards, while the fence was in process of construction. The defendant forbade them from making the fence, protesting they had no right so to do, and that he was paying rent for the whole premises.

## Syllabus.

In this view the defendant asked this instruction, which the court refused:

"If the jury believe, from the evidence, that defendant was in possession of the premises and paying rent, they should find him not guilty."

We think this instruction should have been given. The statute in regard to malicious mischief, (R. S. Ch. 30,) does not apply to cases of this kind, where opposition is made by a claimant of premises of which he is in actual possession, to the erection of a fence across the same without his consent.

There seems to be a defect in the proof as to the county in which the offense was committed. This is fatal. *Price v. The People*, 38 ib. 436.

For the reasons given, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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| 59  | 70  |
| 95a | 334 |

WESLEY W. HUTCHINGS, Adm'r of E. M. Hutchings,

v.

JOHN W. CORGAN.

*EVIDENCE—proving testimony of deceased witness on former trial—act of 1867.* In an action on a promissory note, against the administrator of the maker, on which the same party had previously brought suit against the maker in his life time, the latter testifying therein in his own behalf in relation to the note, but the former took a non-suit, the defendant offered to prove by a witness who was a juror on the trial of the former suit, and who stated that he remembered the testimony of deceased at that time, what the deceased testified to in relation to the note, and how his signature thereto was obtained: *Held*, the evidence, being material to the issue, was competent as falling within the general rule that the testimony of a deceased witness, on the same subject matter between the same parties, may be given on a second trial by any one who remembers it, whether the testimony was reduced to writing or not. Although the action was against an administrator, there is nothing in the act of 1867 that renders such testimony incompetent.

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Opinion of the Court.

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APPEAL from the Circuit Court of Washington county ; the Hon. S. L. BRYAN, Judge, presiding.

Mr. AMOS WATTS, for the appellant.

Messrs. HOSMER & DURHAM, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This suit was originally commenced in the county court of Washington county, and removed to the circuit court of that county, where a trial was again had, which resulted in a judgment for the appellee.

It was admitted on the trial, that the appellee had commenced a suit against Elijah M. Hutchings, in his life time, on the note now in controversy ; that the said Hutchings, on the former trial, testified in his own behalf in relation to the note, and that before the final decision in the cause, appellee took a non-suit.

The appellant offered to prove by the witness Driskill, who was a juror on the trial of the former suit, and who stated that he remembered the testimony of Elijah M. Hutchings, now deceased, what the said Hutchings testified to at that trial, in relation to the note, and how his signature thereto was obtained. The appellee objected to the evidence offered, and the court sustained the objection. This was error.

It is not doubted, that if the deposition of the intestate had been taken and read on the trial of the former suit, it would be competent evidence under the statute, in the present action. We see no reason for making a distinction between written and oral testimony in such cases.

Under our statute, the intestate was a competent witness on the trial of the first case, and the testimony now offered falls under the general rule, that the testimony of a deceased witness, on the same subject matter between the same parties, may be given on a second trial by any one who remembers it, whether the testimony was reduced to writing or not. 1 Greenlf. Ev. sec. 163 ; *Aulger v. Smith*, 34 Ill. 534.

## Syllabus.

Although the action is against an administrator, there is nothing in the act of 1867 that renders such testimony incompetent. The evidence was material to the issue, and ought to have been allowed to go to the jury for their consideration, in connection with the other evidence in the case.

For the error indicated, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

CLARINDA LILLY *et al.*

v.

AARON SHAW *et al.*

1. *AMENDMENT of decree in chancery—within what time it may be made.* Generally, after the lapse of the term at which a final decree is entered in a chancery proceeding, alterations or amendments thereto, upon motion, are not allowed.

2. The exceptions to this rule are substantially the same as in cases of judgments at law, and are confined to mere clerical errors, or of form, or in respect to matters quite of course.

3. *SAME—as to taxing attorney's fees as costs.* So, in a proceeding by bill in chancery for the assignment of dower in certain premises, and for partition thereof, after final decree, covering the entire subject matter of the suit, and the question of costs, determining the proportion each party was to pay, it was *held*, incompetent for the court, upon motion at a subsequent term, to so alter the decree as to make an allowance for the fees of counsel, authorized by the act of 1869 to be taxed as costs in suits for partition where the proceedings are amicable.

4. An order in such case for the payment of so large a sum of money, the fees allowed by the court amounting to \$1200, without notice to the parties to be affected thereby, is void upon principles of natural justice, without reference to any other consideration.

5. Besides, the allowance not being made as costs taxed in the cause, as contemplated by the statute, but the solicitors, in whose favor it was made, being introduced as new parties into the record, upon mere motion, and the

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131 330  
59 72  
156 174  
158 196

59 72  
84a 609  
59 72  
101a 1840

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200 1878  
200 1878

59 72  
dl05a 394

59 72  
209 508  
f209 509  
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Syllabus. Statement of the case.

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sum allowed to them by name, the order, if allowed to stand, would entitle them to execution in their favor, and was, in that respect, irregular.

6. **ATTORNEY'S FEES AS COSTS**—*construction of act of 1869.* The act of 1869, being construed as intending the taxation of counsel fees in partition suits only in cases where the proceedings are amicable, does not apply to a suit begun as an amicable one but which afterwards develops into the ordinary case of adverse parties, at least so far as regards the services rendered after the suit partakes of such nature.

**APPEAL** from the Circuit Court of Richland county; the Hon. R. S. CANBY, Judge, presiding.

This was a proceeding in the Richland circuit court, for partition and assignment of dower. Malinda E. Crout and Sarah Chable being the only heirs at law, and Clarinda Lilly, the widow of Thomas W. Lilly, deceased, uniting with them as complainants, Josiah Crout, husband of said Malinda, and Henry Chable, husband of said Sarah, exhibited their bill at the May term, A. D. 1869, of said court, for the assignment of the dower of the widow and partition between the heirs at law of certain real estate of which Thomas W. Lilly died seized, and particularly described in the bill of complaint.

The parties were represented by Messrs. Shaw, Hayward & Kitchell, as their solicitors.

An interlocutory decree was entered, and commissioners appointed, who made their report at the same term; whereupon the parties assumed adverse positions, Malinda E. Crout and Josiah Crout, her husband, by Shaw, Hayward & Kitchell, excepting to the report, and Clarinda Lilly, Sarah Chable and Henry, her husband, appearing by Preston & Baker, their solicitors, in support of the commissioners' report.

The exceptions to the report were sustained by the court, and other commissioners appointed, who made their report at the same May term, to which the Crouts, by the same solicitors as before, filed exceptions, and the other parties, by their solicitors, contested the exceptions and sought to sustain the report; but the court sustained the exceptions, disaffirmed the report and made still another appointment of commissioners.

At the October term, 1869, the widow, having obtained leave for that purpose, filed her cross bill for the assignment of dower, by Preston, Baker & Wilson, her solicitors, which Malinda Crout, by her solicitors, moved to strike from the files, but the motion was overruled.

The commissioners last appointed having filed their report, it was confirmed by the court, and a final decree was rendered at the October term, 1869, setting off the widow's dower and making partition between the heirs at law, also decreeing that the commissioners should receive the sum of ten dollars each for their services, to be assessed as costs, and that each of the parties should pay one third of the costs of the proceedings.

On the 10th day of the October term, 1870, Shaw & Hayward, without any notice to either of the appellants, made a motion in the cause for an allowance of attorneys' fees, and the record states: "And it being shown by the evidence that the estate of Thomas W. Lilly was valued at \$40,000, at least, an allowance of \$1200 is allowed Aaron Shaw and Horace Hayward for fees, one sixth to be paid by the widow, and the remainder by the said Sarah Chable and Malinda E. Crout, in equal proportions, to wit: \$500 each."

On the 11th day of the same term a motion was made on behalf of Clarinda Lilly and Sarah Chable, to set the order allowing attorneys' fees aside, which was granted, and on the same day the following entry was made: "And after evidence heard, the allowance and judgment of yesterday is affirmed;" whereupon the widow and Sarah Chable prayed an appeal to this court.

Mr. B. B. SMITH and Mr. M. SCHÆFFER, for the appellants.

Messrs. SHAW & HAYWARD, *pro se.* and Mr. W. B. COOPER, for the appellees.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was a proceeding by bill, in the Richland circuit court, filed on behalf of appellants and Malinda E. Crout, as the



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Opinion of the Court.

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widow and heirs at law of Thomas W. Lilly, deceased, for the assignment of dower and partition. The suit was commenced as an amicable one, the parties in the first instance being all represented by Shaw, Hayward & Kitchell, solicitors. Soon after the first steps were taken in the cause, conflicting, adverse interests were developed, and appellants were required to employ solicitors for themselves. The initiative of hostilities was taken on behalf of Malinda Crout, one of the two heirs at law, with whom her husband was joined as a party, with whom also appellees and Kitchell took sides, and from thence to the final decree in the cause at the October term, 1869, exclusively represented them in opposition to appellants.

The decree at that term was final, covering the entire subject matter of the suit, the question of costs, determining the proportion each party was to pay. Upon the lapse of that term, the cause ceased to be pending.

At the October term, 1870, one term, at least, intervening, Shaw and Hayward, two of the three solicitors, who had, after the commencement of the suit, exclusively represented the interests of Malinda Crout and her husband, made an application to the court, upon motion, but without any notice to appellants, for an allowance of counsel fees to them, in the cause, which had gone to a final decree at the October term, 1869, upon which the court, as appears by the record, made the following order, viz: "And it being shown by the evidence that the estate of Thomas W. Lilly was valued at \$40,000, at least, an allowance of \$1200 is allowed Aaron Shaw and Horace Hayward for fees, one sixth to be paid by the widow, and the remainder by the said Sarah Chable and Malinda Crout, in equal proportions of \$500 each."

On the next day after its entry, a motion was made on behalf of appellants to set the order aside, and on the same day the following entry of record appears: "And after evidence heard, the allowance and judgment of yesterday is affirmed."

## Opinion of the Court.

The questions arising upon this record, are, first, whether such an alteration of the decree at a subsequent term, upon motion, is allowable; and, second, whether the case was one within the purpose and intention of the statute of 1869, respecting the allowance of counsel fees in suits for partition.

It is a general rule, that when a decree is regularly obtained and enrolled, it can not be altered, except by bill of review. 2 Daniell's Ch. Pr. 1221, 1232; *Bennett v. Winter*, 2 Johns. Ch. 205; *Wiser v. Blakely*, id. 488; *Mead v. Armes*, 3 Vermont, 148; *Millsbaugh v. McBride*, 7 Paige, 509; *Bramlette v. Pickett*, 2 A. K. Marshall, 11.

The English practice of enrollment, which has substantially gone into disuse in that country, has never been adopted in this State, and the only effect of enrollment seems to have been that, before enrollment, the decree was not regarded as a record, was subject to be altered by the court itself, upon a rehearing; while a decree which had been enrolled, was not susceptible of alteration, except in a court of appeals, or by bill of review. But the courts of this country, where a practice obtains similar to ours, consider a decree as enrolled, or, in other words, as a complete record, when it is regularly entered, and the term at which it was so entered has elapsed. *Burch v. Scott*, 1 Bland, 120 S. C.; 1 Gill & Johns. 393; *Dexter v. Arnold*, 5 Mason, 303, 310; *Whiting v. Bank of United States*, 13 Peters, 6, 13.

The exceptions to the rule disallowing alterations or amendments of a decree after the lapse of the term, upon motion, are substantially the same as in cases of judgments at law, and are confined to mere clerical errors, or of form, or in respect to matters quite of course. 2 Dan. Ch. Pr. 1233. As to amendments of judgments, see *Coughran v. Gutcheus*, 18 Ill. 391; *United States Bank v. Moss*, 6 How. (U. S.) 31, and cases there cited.

It was no more allowable for the court, at a subsequent term, to alter the decree in respect to costs, than as to the partition of the property, or the measure of the widow's dower therein.

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Opinion of the Court.

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In *Coleman v. Surell*, 2 Cox, 206, Lord THURLOW would not allow a decree to be varied by giving costs to a defendant who was a mere trustee, and, as such, would have been entitled to them, if they had been asked for at the hearing.

In *Weston v. Haggerston*, Coop. Rep. 134, Lord ELDON held that, all errors on the face of the schedules could be rectified, even after enrollment, but that there could be no correction, except of such apparent errors; and he therefore held, that no affidavit introducing a new fact, after enrollment, could be permitted.

We are clearly of opinion, therefore, that it was not competent for the court to alter the decree of the October term, 1869, upon motion made at the October term, 1870; that such a practice would divest judgments and decrees of all sanctity; that it is against public policy, because, if allowable, there could be no definite limit to litigation.

The order having been made for the payment by appellants of this large sum of money, without any notice to them, was void upon principles of natural justice, without reference to any other considerations.

But, aside from all other questions, the case was not within the purview of the statute of 1869. In *Kilgour v. Crawford*, 51 Ill. 250, it was held, that the act should be construed as intending the taxation of counsel fees only in cases where the proceedings are amicable. It does not affect the question, that this was begun as an amicable suit, when it immediately developed into the ordinary case of adverse parties. The court surely could not have intended to allow appellees, two of the three solicitors who filed the petition, the enormous sum of \$1200 for merely filing the petition. If he did not, then the order is to compel appellants to pay for the services of counsel whose principal efforts were on behalf of the opposite party, and against them. It would be a novel addition to the *quantum meruit* count, for professional services, to go into our form books running thus: "For the work, labor and professional services of plaintiff, as an attorney at law, done and performed as such

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Opinion of the Court.

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attorney in a certain suit lately pending, etc., of A B against the said defendant, at the request of, for, and in behalf of the said A B."

The principle of such a count would be precisely the same as that of the allowance in question. It, no doubt, has happened that the services of attorneys at law, rendered upon the retainer of one party, were of great value to the opposite party. But it appears from the record that the services of appellees were not of that kind. They were evidently bestowed with zeal, ability and effect against appellants.

The statute in question was not designed as an instrument of injustice, or to throw the rights of parties into confusion. Why are appellees any more entitled to such an allowance than the solicitors for appellants? Then, what has become of Kitchell's right to compensation? Counsel say that he has since died, but appellees did not apply as survivors, or show that their rights were several, not joint, with those of Kitchell.

If appellees could rightfully have their allowance one year after the decree, the other solicitors may, two years after.

Besides the irregularities pointed out, there is still another. The \$1200 allowance was not made as costs taxed in the cause, but appellees were introduced as new parties into the record, upon mere motion. That sum was allowed to them by name, and they would be entitled to execution in their favor, if the order were allowed to stand.

The order making such allowance must be reversed.

*Order reversed.*

CHARLES W. PHELPS

v.

HARLOW B. HUBBARD.

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| 59  | 79  |
| 159 | 641 |
| 59  | 79  |
| 70a | 363 |

1. *RECOVERY on the common counts—or on special count.* In an action under the common counts to recover for work done by the plaintiff for the defendant, it appeared there was a special contract in writing for the performance of the work, and the work had been only partially completed. There was no abandonment of the contract by mutual consent, and no rescission thereof by any act of the defendant: *Held*, the rights of the plaintiff should be determined by the contract alone,—he could not recover under the common counts, the price of the work already performed.

2. Nor did the mere fact, that the parties had had an accounting, showing the amount due the plaintiff, and the expression of an intention on the part of defendant to send him some money, have the effect to authorize a recovery of that amount in such an action.

WRIT OF ERROR to the Circuit Court of Union county; the Hon. M. C. CRAWFORD, Judge, presiding.

Messrs. MULKEY, WALL & WHEELER, for the plaintiff in error.

Mr. WILLIAM J. ALLEN, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

A single point is presented in this case: whether, under the facts, the plaintiff can recover for the work performed, when there was a special contract in writing?

The declaration is in *indebitatus assumpsit*, and the proof shows that there was a written agreement under seal, between plaintiff in error of the one part, and defendant in error and one Adams of the other part, for the performance of the work.

After a partial performance, the parties had a settlement, as it was termed by plaintiff in error, and the result was as follows:

|                          |   |   |   |                 |
|--------------------------|---|---|---|-----------------|
| "Hubbard's indebtedness, | - | - | - | \$3,754.87      |
| Credited,                | - | - | - | 2,959.69        |
| Amt. due Phelps,         | - | - | - | <u>\$795.18</u> |

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Opinion of the Court.

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Phelps, the only witness, testified, that after the settlement he continued to haul logs ; that he had never completed the contract, and that there had not been any discharge, rescission or abandonment of it, by the acts or with the assent of the parties.

The court excluded the evidence from the jury.

This is assigned for error, and we have been referred to the cases of *Smith v. Gillett*, 50 Ill. 292, and *Ruggles v. Gatton*, ib. 412, in support of the position of counsel for plaintiff in error.

The only principle announced in those cases, which has any application to the case at bar, is, that it is error to exclude from the consideration of the jury any evidence which tends to prove the issue in the cause.

The proof in this case, did not tend to prove any indebtedness. The plaintiff below was the only witness, and he stated most explicitly that the work had been only partially performed, and that it was done under a special contract in writing, from which he had not been released.

The submission of this proof to the jury, for their deliberation, would have been a farce ; for a verdict in favor of the plaintiff, based upon it, would have been set aside.

But it is contended that, although there was a written contract, the parties accounted with each other concerning the amount due, and that there was a promise to pay it. In support of this position, counsel cite *Underhill v. Gaff*, 48 Ill. 199.

The analogy between the cases is not apparent.

In the case cited, the court held, that from the acts of the parties, it was to be inferred that the special contract was absolutely terminated.

In this case, the plaintiff did not, in his testimony, claim any termination of the contract. but stated that he was still bound to fulfill it, according to the original writing.

The assumed promise to pay the amount found to be due, consisted of the remark, on the part of the defendant in error, after the accounting, that he would send some money by

## Syllabus.

express to Phelps. This did not make a new contract, and did not end the old one.

The contract was not executed so that nothing remained to be done but to pay the money. There was no abandonment of it by mutual consent; no rescission by the act of the party charged to be in default.

The plaintiff in error could not, therefore, treat it as at an end, and recover for the price of the work performed.

The contract alone must determine his rights. 1 Chit. Plead. 355; 2 Greenlf. Ev. sec. 104; *Throop v. Sherwood*, 4 Gilm. 92; *Holmes v. Stummel*, 24 Ill. 370; *Walker v. Brown*, 28 Ill. 378.

The judgment of the court below must be affirmed.

*Judgment affirmed.*

WILLIAM REEVES, JR.

v.

MARTIN HERR, Executor, etc.

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| 59  | 81  |
| 184 | 583 |
| 59  | 81  |
| 98a | 670 |

1. WITNESS—COMPETENCY—*whether widow of testator may testify in behalf of executor.* In an action by the executor of a deceased person, to recover on an account in favor of the deceased against the defendant, it was *held*, incompetent for the widow of the testator to testify for the plaintiff in relation to a conversation of the defendant with her husband in her presence after their marriage, in regard to the account, by which it was sought to prove an admission by the defendant of the account sued on, and a promise, on his part, to pay the same within the period fixed by the statute of limitations barring such an action, it not appearing that the witness had a direct interest in the event of the suit.

2. LIMITATIONS—as to the ~~several~~ items of an account. Where all the items of an open, unliquidated account are on one side, the last item happening to be within the period fixed by the statute of limitations barring an action on the account, will not draw after it those that are of longer standing, so as to protect them from the operation of the statute.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

6—59TH ILL.

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Statement of the case. Opinion of the Court.

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This was an action of assumpsit, brought by Martin Herr, as executor of Adam Herr, deceased, against William Reeves, Jr. The declaration contained the usual common counts for goods, wares, etc., sold to Adam Herr, in his lifetime. To this declaration the defendant filed two pleas. First, general issue, and second, the plea of the statute of limitations. The replication asserts that the cause of action accrued within five years. Upon a trial by the court, a jury being waived, judgment was rendered for the plaintiff. The defendant appeals.

Messrs. SNYDER & DILL, for the appellant.

Mr. JOHN HINCHCLIFFE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The principal question in this case is, whether the testimony of Catharine Herr, the widow of Adam Herr, was rightly admitted.

It is a well settled general rule, that a husband and wife, while that relation exists, can not testify for or against each other. And it is no doubt fully established by the authorities, that even after the dissolution of the marriage contract, the husband and wife are not, in general, admissible to testify against each other, as to any matters which occurred during the existence of that relation. *Monroe v. Twisleton*, Peak's Add. Ca. 319; *Doker v. Hasler*, Ry. & Mo. 198; 1 Greenlf. Ev. § 337; *Stein v. Bowman*, 13 Pet. 210; *Babcock v. Booth*, 2 Hill, 182; *Neubrecht v. Santmeyer et al.* 50 Ill. 75; *O'Connor v. Majoribanks*, 4 Man. and Gr. 435.

And it is contended, that in the latter case the wife is only excluded as a witness when she is called *against* her husband or his representative, and asked to disclose any fact imparted to her by her husband in the trust and confidence of that relation; and that the present case, the widow having been called *for* her husband's representative, does not fall within the rule.



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Opinion of the Court.

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In the cases of *Ratcliff v. Wales*, 1 Hill, 63, and *Dickerman v. Graves*, 6 Cush. 308, being actions brought by a husband for criminal conversation with his wife, it was held, that the latter, after a divorce from the bonds of matrimony, was a competent witness for the husband to prove the charge laid.

In both cases, the general rule was admitted, that the husband and wife are not competent to testify against each other as to what occurred during the marriage relation, even after the marriage contract was at an end, and the cases were held not to come within the rule, as the wife was not called to testify *against* but in favor of the husband, and there was no violation of confidence reposed in her by the husband, for he himself called her to testify, and the fact she was offered to prove, did not come to her knowledge in consequence of the marriage relation.

These authorities favor the appellee's position, so far as they lay stress upon the fact that the wife was not called *against* the husband.

It is laid down in the text-books, that this rule of exclusion of husband and wife as witnesses for or against each other, is adhered to after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery; and the rule is so laid down generally, without restricting it to the case where they are called to testify *against* each other. 2 Stark. Ev. 706; 1 Greenl. Ev. § 337; 1 Phill. Ev. 75; Tyler Inf. and Cov. 323.

The exclusion of the testimony of husband or wife for each other, is more frequently put upon the ground of unity of interest, and if that were the only ground, the position of the appellee would be more tenable; but we conceive this rule of exclusion does not rest solely upon that ground, but on considerations of public policy as well.

It has been resolved, says Lord COKE, that a wife can not be produced either against or for her husband, *quia sunt duæ animæ in carne una*; and it might be a cause of implacable

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Opinion of the Court.

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discord and dissension between the husband and the wife, and a means of great inconvenience. 1 Co. Litt. 7 a.

In 2 Kent Comm. 176, it is laid down, that "the husband and wife can not be witnesses for or against each other. This is a settled principle of law, and it is founded as well on the interest of the parties being the same, as on public policy." See, also, 1 Greenl. Ev. § 334; Tyler Inf. and Cov. 320; *Stein v. Bowman*, 13 Pet. 222.

Our statute abolishing the incompetency of witnesses on the ground of interest, after enacting in the first section, that no person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, etc., declares in the fifth section: no husband or wife shall, by virtue of section one of this act, be rendered competent to testify for or against each other, as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in certain specified cases, of which this is not one.

But if the policy of the law, as contended, excludes the wife as a witness only when called *against* her husband or his representative, and to prevent a violation of any confidence reposed in her by the husband, why, after the law has removed all objection to the competency of a witness on the ground of interest, should not the husband himself, in his life time, be permitted to call his wife as a witness *for* him?

Why does the statute, after providing that interest shall be no objection to the competency of a witness, declare, that notwithstanding, by virtue of that, the wife shall not be rendered competent to testify for her husband? This must be because interest is not the only ground of objection to husband or wife testifying for each other, but that sound policy, having respect to the preservation of family peace and happiness, excludes the testimony.

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Opinion of the Court.

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And this enactment would seem to be a recognition and affirmance of this rule of public policy.

It can not be said here, as in the case cited from 6 Cush., that there could be no violation of any confidence reposed in the wife by the husband, because he himself called her to testify. This witness was called by the executor, and although the representative of the husband as to his personal estate, he was not his representative to determine the fitness of calling upon the widow for a disclosure of matters occurring during the marriage.

Although called *for* the executor, the witness might have been subjected to a cross-examination, and in this manner be brought into conflict with the interest of the estate.

What was sought to be proved by the witness here, was a conversation between the defendant and the husband, before and in the presence of the witness, his wife, which is claimed to have amounted to an admission, by the defendant, of the account sued upon, and a promise on his part, within the period fixed by the statute of limitations, to pay it.

We do not find from the authorities, that this rule of exclusion is confined to subjects which are confidential in their nature, and we think it should apply whenever the wife is called upon to disclose any matter, which came to her knowledge in consequence of the marriage relation.

The conversation in question, though not between the witness and her husband, but between him and the defendant, yet, as it occurred between them in the presence and hearing of the wife, we must regard that she came to the knowledge of it by means of her situation as wife, that she could not properly be admitted to testify concerning it against the representative of her husband, nor should she be admitted to testify in his favor.

As the adverse party in this case sues as the executor of a deceased person, the defendant, under the second section of the statute, was not allowed to testify in his own behalf.

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Opinion of the Court.

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If the witness, Mrs. Herr, had a direct interest in the event of the suit, then, under the third specified case in the second section, the defendant would be permitted to testify as to the same admission and conversation she testified to. But as it does not appear whether she had any such direct interest or not, the defendant would not be allowed to testify, under the statute, because of the death of Adam Herr, and the inability to have his testimony offered and considered with that of the defendant.

But the wife of Adam Herr was so identified with him, that they essentially constituted but one party, and so far as the interests of the defendant are concerned, it would seem to matter little whether the testimony of the one or that of the other, was introduced against him. If, then, on the death of Adam Herr, his widow should be received to testify for his representative, as the defendant could not meet her testimony with his own, it would seem to be unfair towards him, and in violation of the spirit of the statute, which seems to intend, that there should be a mutuality and equality of opportunity in parties testifying the one against the other.

When the statute had provided, that in a suit brought by the executor of a deceased person, the defendant should not be allowed to testify, and that no husband or wife should, by virtue of section one of the act, (which abolishes the disqualification of a witness, by reason of interest,) be rendered competent to testify for or against each other, as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution, could it have been intended, that after the husband's death, his widow might be admitted to testify as to such transaction or conversation. Had such been the intent of the statute, would it not have provided, that in such case the defendant also should be allowed to testify, at least as to the same transaction or conversation?

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Syllabus.

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We are of opinion, the witness was not admissible, within the fair intent and meaning of this statute, as well as on the ground of public policy.

The question argued, as to the admissibility of the witness from necessity, to prove the book of accounts, does not arise on the record, as the book does not appear to have been offered in evidence, and the husband himself appears to have made the entries.

The most part of the account was apparently barred by the statute of limitations. The items within five years before suit brought, would not, as supposed, take the items beyond that time out of the statute. There were no mutual accounts here,—the account was all on one side.

Where all the items of an open unliquidated account are on one side, the last item which happens to be within six years, will not draw after it those that are of longer standing, so as to protect them from the operation of the statute of limitations. *Kimball v. Brown*, 7 Wend. 322; *Thompson v. Reed*, 48 Ill. 119.

The testimony of Catharine Herr being all that was offered on the part of the plaintiff, for error in its admission the judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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ABRAHAM CHIDESTER *et al.*

v.

THE SPRINGFIELD & ILLINOIS SOUTH EASTERN  
RAILWAY Co.

1. CONTRACT—*of its certainty.* A party executed a bond to a railroad company, covenanting therein to convey to the company, in consideration of the construction of their road, depot and station house, in a certain locality, the right of way through a certain tract of land belonging to him, “and

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Syllabus. Opinion of the Court.

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also seven acres of land in said section, tract and orchard, adjoining to said right of way on either side thereof." *Held*, the instrument was not so uncertain in its terms as for that reason to be declared a nullity, and that the bond must have been understood by the parties as requiring a conveyance of the right of way wherever the company might choose to establish their track, and a strip of land of uniform width extending along the railway through the entire tract described in the bond, and having three and one half acres on each side of the right of way.

2. **SPECIFIC PERFORMANCE**—*to what extent decreed.* But the company having so constructed their road as to leave a tract containing but nine-tenths of an acre on one side of the right of way, it was *held*, erroneous, in a suit for the specific performance of the contract, to decree to the company the nine tenths of an acre on that side, and six and one tenth acres on the other. The company were at liberty so to locate their road as to entitle them to seven acres, and not having chosen to do so, they can not claim an equivalent on one side of the right of way for what they have voluntarily abandoned on the other.

3. **SAME**—*of parol conditions with third persons.* Upon its being contended that the bond was delivered by the obligor therein to a third person, to be held by him until the citizens of the town, in which the tract of land was situated, should raise and pay the sum of \$350, as a further consideration for the conveyance, estimated to be one half the value of the land, which was never done, but of which condition the company had no knowledge, it was *held*, the bond having been delivered to the company, they, having acted in good faith upon its terms, had the right to insist upon their performance without reference to any parol conditions or agreements made with other parties, and of which they were ignorant.

APPEAL from the Circuit Court of Clay county; the Hon. R. S. CANBY, Judge, presiding.

Messrs. COPE & BOYLES, for the appellants.

Mr. R. P. HANNA and Mr. R. D. ADAMS, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

In May, 1869, Kinnaman executed a bond, by which he covenanted to convey to the appellee, in consideration of the construction of its road, depot and station house, in a certain locality, the right of way through a certain tract of land belonging to him, "and also seven acres of land in said section, tract and orchard, adjoining to said right of way on

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Opinion of the Court.

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either side thereof." The railway company has laid its track and erected its buildings as required by the bond, and now demands of the heirs of Kinnaman a conveyance of the land.

It is insisted by them, that the bond was delivered by their father to a third person, to be held by him until the citizens of the town should raise and pay to Kinnaman \$350, estimated to be one half the value of the land, and that this was never done. The proof upon this point is not very satisfactory, but even if it were positive, it would be immaterial, for it is not pretended the railway company had any knowledge of such condition. The bond was delivered to it, and it acted in good faith upon its terms, and has the right to insist upon their performance without reference to any parol conditions or agreements made with other parties, and of which it was ignorant.

The only difficulty in the case, arises from the uncertainty in the description of the seven acres. Courts, however, are properly loth to pronounce an instrument a nullity, merely because of the obscurity of its terms, and we think the one before us is sufficiently certain to be carried into effect.

The word "either" is sometimes used in the sense of one *or* the other of several things, and sometimes in the sense of one *and* the other. Its use in this last sense is not infrequent. Thus, it is common to say on either hand, on either side, meaning, thereby, on each hand or side.

Again, it is common to describe land, in conveyances, as a certain number of acres off a certain side of a particular tract, and such descriptions are always held good. They are held to describe a strip of land of sufficient width to make the requisite number of acres, and of uniform width throughout.

Applying this rule to the present case, we are of opinion that the bond was understood by the parties, as requiring a conveyance of the right of way wherever the company might choose to establish its track, and a strip of land, of uniform width, extending along the railway through the entire tract described in the bond, and having three and a half acres on

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Opinion of the Court.

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each side of the right of way. This is the only construction which gives certainty to the contract. It is not claimed by the company, that the bond calls for a conveyance of seven acres on one side of the right of way, and as much upon the other, making a tract of fourteen acres. The company only asks for a conveyance of seven acres, exclusive of the right of way, and we have no doubt both parties understood the bond as meaning that this tract of seven acres should lie along the right of way, equally upon each side; or, in the language of the bond, on either side.

As we understand the decree, and the plat which we find in the record, the company having so constructed its road that there is only a tract containing nine tenths of an acre on the east side of the right of way, the court has given the company six and one tenth acres on the west side. We are of opinion, such a decree would not fairly execute the contract. The company was at liberty so to locate its road as to entitle itself to seven acres. It has not chosen to do so, and it can not claim an equivalent on one side of the right of way for what it has voluntarily abandoned on the other. The decree should have been for the nine tenths on the east side, and three and a half acres on the west side, of uniform width, extending across the tract along the right of way.

The decree is reversed and the cause remanded.

*Decree reversed.*

JUSTICES WALKER and McALLISTER: We concur in the judgment of reversal, but hold that the contract is too uncertain in its provisions to be capable of specific performance.



## Syllabus.

ZACHARIA DURHAM

v.

LUCINDA MULKEY.

1. **EVIDENCE IN CHANCERY—how preserved.** Where the evidence in a chancery proceeding is not preserved, but it appears from the decree that the court found, upon the evidence, certain facts, upon which the decree is based, it is sufficient—it is not necessary that the decree should contain a recital of all the evidence heard.

2. **CHANCERY—trial on bill and answer—waiver.** Where, in a suit in chancery, the defendant, at the return term, filed his sworn answer to the bill, and no replication being filed, the court ordered that the cause be set down for hearing on bill and answer at the next term of the court, upon objection that the court below erred in proceeding to hear evidence in the case, it was *held*, the defendant having appeared, and without objection, proceeded to trial on the evidence, he thereby waived his right to insist that the trial should have been on bill and answer.

3. **DOWER—oath of commissioners.** In a proceeding by petition for assignment of dower, where the report of the commissioners appointed to assign dower stated that they were duly sworn in open court, but the character of the oath taken nowhere appeared in the report or other portions of the record: *Held*, this omission in the record was fatal. The statute is peremptory that the commissioners shall take an oath, and what it shall contain is specifically prescribed. It must appear that the oath conformed to the requirements of the statute.

4. In such a proceeding, and as to such a requirement, it is for the party relying upon the action of the commissioners to show that the statute has been pursued, and it is unnecessary that any exceptions should be filed to the report of the commissioners, to render tenable, on error, the objection that their oath did not conform to the statute.

5. **DECREE—on assignment of dower—where a sum is decreed in lieu of dower.** Where a sum, to be paid annually, is decreed the widow, in lieu of dower, it is proper to decree that an execution may issue for the collection of the same, in case of default in the payment thereof; but when a lien is retained on the land, the decree should require it to be first sold under the execution.

APPEAL from the Circuit Court of Williamson county; the Hon. A. D. DUFF, Judge, presiding.

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Opinion of the Court.

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Mr. WILLIAM J. ALLEN, for the appellant.

Messrs. MULKEY, WALL & WHEELER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a petition filed by appellee, in the Williamson circuit court, against appellant, for the assignment of dower, which she claimed to hold in the lands described in the petition. Appellant filed his answer at the return term, denying appellee's right of dower in the premises. No replication being filed, the court ordered that the cause be set down for hearing on bill and answer at the next term of the court.

At the next term, a trial was had, and the decree recites, that the parties again came, by their respective solicitors, and the cause was submitted for a final hearing, upon bill, answer and proofs, and the court, after a careful examination of the evidence, finds the various facts upon which the decree is based.

It has been held that the evidence must appear in the record, in some mode or other, or the facts must be found by the court from the evidence. *Wilhite v. Pearce*, 47 Ill. 413; *Pankey v. Raum*, 51 Ill. 88; *Grob v. Cushman*, 45 Ill. 119; *Martin v. Hargardine*, 46 Ill. 322. The facts were found by the court upon the evidence in the case, and brings this decree within the rule announced in those cases.

It is next objected, that, the court below having set the case for hearing on bill and answer, it was error to hear evidence. It is a sufficient reply to this position to say that both parties appeared and went to trial without objection. If appellant was not disposed to proceed to trial on the evidence, he should have objected, and insisted upon a hearing alone on bill and answer. Having failed to object, he must be held to have waived his right to insist that the trial should have been on bill and answer. The case of *Marple v. Scott*, 41 Ill. 50, is decisive of this question.

It is next objected, that there is nothing in the record to show that the commissioners were sworn to assign dower, as

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Opinion of the Court.

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required by the statute. Their report states they were duly sworn in open court, but the report, as well as other portions of the record, fails to show the character of the oath they took. Whether it conformed to the requirements of the statute or not, nowhere appears. The statute is peremptory, that the commissioners shall take an oath, and what it shall contain is fully and specifically prescribed. Being a statutory requirement, it can not be dispensed with in such a proceeding. In *Tibbs v. Allen*, 27 Ill. 119, it was held, that the oath must conform to the requirements of the statute. In this case, the record fails to disclose that the law, in this respect, has been observed, which was manifest error. It is, in fact, only replied to this assignment of error, that no exception was taken. In such a proceeding, and as to such a requirement, it is for the party relying upon the action of the commissioners to show that the statute has been pursued. It was not necessary that any exceptions should be filed to the report of the commissioners, to render the objection tenable.

It is next urged that the court erred in awarding execution for the collection of the sum decreed the widow in lieu of dower, in case appellant should make default in payment, as required by the decree. It is not error to decree that an execution may issue for the collection of the amount decreed to be annually paid in lieu of dower, but when a lien is retained upon the land, the decree should require it to be first sold under the execution. Inasmuch as the land is subject to the lien, when the owner comes to sell it, the value would be depreciated by the lien, and if the amount should be collected of the first owner, the purchaser would obtain all the benefits of a reduction in the price of the land, and still escape the burden placed upon it by the decree. In this respect the decree should be modified.

The decree is reversed and the cause remanded.

*Decree reversed.*

DANIEL HAY *et al.*

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

QUO WARRANTO—*of the information.* An information in the nature of a *quo warranto* must run "in the name and by the authority of the People of the State of Illinois," as required by the constitution, and the omission of these words may be taken advantage of in arrest or on error.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

On the 6th of April, 1870, John Michan, State's attorney for the second judicial circuit of the State of Illinois, on the relation of several persons, filed in the circuit court of Washington county an information in the nature of a writ of *quo warranto*, against Daniel Hay and others, alleging, that by act of the State legislature of March 31st, 1869, the "city of Nashville" was incorporated; that by sec. 1 of article 2 of the city charter, the city government was to consist of one mayor, and two aldermen from each ward, and that by another section, it is provided, that three aldermen may be elected from each ward; that, by the terms of the charter, a general election of all elective officers should be held the third Monday of April in each year; that, by a subsequent act of the legislature, the time for holding general elections in all cities, for the year 1869, was extended to the 1st Tuesday in June; alleging that no election was held in said city of Nashville for the year 1869, on or prior to the 1st Tuesday of June; that, from the 6th of July, 1869, said Daniel Hay has usurped and unlawfully exercised the office of mayor of said city; that the other defendants have, for the same time, unlawfully exercised the office of aldermen, and that all the defendants have, for the same time, unlawfully exercised the authority of the city council, as mayor and aldermen, and that all have, for the same time, and still do, usurp and unlawfully exercise the rights of city council, etc.

The defendants entered a motion to quash the information, for the reason that the same did not run "in the name and by the authority of the People of the State of Illinois," and because different offices were charged to be usurped, and for misjoinder of offenders and offenses, which motion was overruled by the court. Whereupon the court sustaining a demurrer to the defendants' amended plea, the defendants elected to stand by their plea, and judgment was entered against them, to reverse which judgment they bring the record to this court.

Mr. I. MILLER, and Mr. P. E. HOSMER, for the appellants.

Messrs. MICHAN, LECOMPTE, WATTS & PHILLIPS, for the appellees.

Per CURIAM: This is a proceeding in the nature of a writ of *quo warranto*.

The motion to quash should have been sustained. The information does not run, "in the name and by the authority of the People of the State of Illinois," as required by the constitution.

These words can not be dispensed with. They constitute matter of substance, and advantage can be taken of their omission, in arrest or on error.

This proceeding is a prosecution, and the language of the constitution must be used, as in indictments. *Wright v. The People*, 15 Ill. 417; *Donnelly v. The People*, 11 Ill. 552.

The judgment is reversed.

*Judgment reversed.*

BENJAMIN C. WHITLOCK *et al.*

v.

## WILLIAM DENLINGER.

1. PURCHASE MONEY—*failure of title*. A purchaser of land, receiving a deed therefor with covenants of title, can not avoid the payment of a promissory note given for the purchase money, on the ground that the grantor had no title, if his possession has not been disturbed, nor the paramount title asserted.

2. The grantee can not retain the benefit of the covenants in the deed from his grantor, and the possession of the premises, and yet avoid the payment of the purchase money.

3. VENDOR AND PURCHASER—*rescission of contract for fraud—placing vendor in statu quo*. If a party has been induced, through fraudulent practices of his grantor, to take a title which subsequently fails, he may apply to a court of equity to have the contract cancelled, but before he can do so, he must place the opposite party *in statu quo* by reconveying the land, or at least releasing the covenants and surrendering the possession of the premises to his grantor. In such cases, equity will not require the purchaser to pay the purchase money, and rely for indemnity on his covenants.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. HENRY C. GOODNOW, for the appellants.

Messrs. SNYDER & DILL, and Mr. B. B. SMITH, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was an action of assumpsit, brought in the Marion circuit court by the appellee against the appellants, on a promissory note.

The appellants filed two special pleas, in the first of which, it is averred, that the note on which the action is brought, was assigned to the appellee merely for the purpose of collection; that the sole consideration of the note was certain real estate, conveyed by James Erwin, the payee of said note, to the appellant Whitlock, by warranty deed, containing the usual

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Opinion of the Court.

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covenants ; and that the said Erwin, at the date of the execution of said deed, had not, nor has he since, acquired the fee simple title to said tract of land.

It is alleged, that by reason of the facts stated in the first plea, there has been a total failure of the consideration of the note.

The second plea is, in substance, the same as the first, except it is alleged, that by reason of the facts therein stated, there has been a partial failure of the consideration of the note.

To these pleas, the appellee interposed a demurrer which the court sustained, and the appellants electing to stand by their pleas, judgment was rendered for the appellee for the amount of the note. The decision of the court sustaining the demurrer to the special pleas, is now assigned for error.

The demurrer was properly sustained. Both pleas are defective in the statement of facts necessary to constitute a defense to the note on which the action is brought. It is not averred, in either plea, that any paramount title has ever been asserted, or that the grantee has been disturbed in the possession of the premises. We will presume, that possession accompanied the delivery of the deed, and it does not appear but that the grantee is still in possession, and in the enjoyment of the rents and profits of the premises.

It is true, the land, and not the covenants of the deed, is the true consideration of the note. Where a party has been induced, through fraudulent practices by the grantor, to take a title which subsequently fails, this fact would authorize the grantee to apply to a court of equity to have the contract cancelled, but before he can do so, he must place the opposite party *in statu quo* by reconveying the land, or at least releasing the covenants, and surrendering the possession of the premises to the grantor. In such cases, equity will not require the purchaser to pay the purchase money, and rely for indemnity on covenants that may prove to be entirely worthless.

## Syllabus.

The grantee can not, however, retain the benefit of the covenants in the deed, and the possession of the premises, and yet avoid the payment of the purchase money. *Vining v. Leeman*, 45 Ill. 246; *Deal v. Dodge*, 26 Ill. 458.

Perceiving no error in the record, the judgment must be affirmed.

*Judgment affirmed.*

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LOUIS RUNDE

v.

WILLIAM RUNDE.

1. STATUTE OF FRAUDS—*promise to pay the debt of another.* A, being indebted to B, executed to him a promissory note for a sum larger than the indebtedness, and secured the same by a chattel mortgage on property fully worth the amount of the note. For the excess of the sum secured by the mortgage over the actual indebtedness, A was to receive from B certain lumber, but which he never received. A afterwards became indebted to C, but being in embarrassed circumstances could not pay him, all his property being covered by the mortgage, which B had proceeded, or was about to proceed, to foreclose. The three parties met together, and to satisfy the claim of C, an arrangement was made by which the demand A had on B for the difference between his actual indebtedness and that expressed in the mortgage, was compromised at the sum A owed C, B agreeing to pay the same to C: *Held*, B's promise in that regard was not within the statute of frauds.

2. RECOVERY *under the common counts.* And C was entitled to recover on the same, under the common counts in assumpsit. The promise of B being regarded as an original undertaking to pay his own debt, to C, it was unnecessary to declare specially.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Messrs. HAY & KNISPEN, for the appellant.

Mr. WILLIAM WINKELMAN, for the appellee.

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Opinion of the Court.

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Mr. JUSTICE McALLISTER delivered the opinion of the Court :

This was *indebitatus assumpsit* upon the common counts, for work and labor, money had and received, and account stated, brought by appellee against appellant, in the St. Clair circuit court. The plea, general issue, with notice of set off.

Upon the trial before the court and a jury, the appellee introduced evidence of work and labor performed by him for appellant, and the latter of an account against appellee for board, and money paid, laid out and expended, upon which the jury passed. The evidence was conflicting, and so nearly balanced as to afford no ground for the interference of this court.

It appears, also, that appellee presented another ground of recovery, based upon the following facts: On the 23d of April, 1869, one C. J. Knobel, and Ernst Runde, being engaged as partners in the business of manufacturing sash and blinds, and having become indebted to appellant in the sum of about \$2,300, executed their promissory note to him for \$3,400, payable in one year, with interest at the rate of ten per cent per annum, payable semi-annually, to secure which they, at the same time, executed to appellant a chattel mortgage, in the usual form, upon the steam engine, boiler, machinery, tools, etc., in their factory, being a large amount of personal property, and ample security for the sum secured by the mortgage.

At the time of making these instruments, there was a parol agreement made to the effect that, for the difference between the amount of actual indebtedness, and that expressed in the note, appellant was to let them have lumber after the making of the mortgage, though no time was specified within which it was to be done.

It also appears, that after giving the mortgage, the mortgagors became indebted to appellee for work and labor, the balance due amounting to \$150. The parties were all related

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Opinion of the Court.

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to each other, except Knobel ; Ernst Runde and appellee being brothers, and appellant their uncle.

It appears, that in the fall of 1869, (the precise time not appearing,) the firm of Knobel & Runde became embarrassed, unable to carry on their business, and about to dissolve partnership, and appellee becoming alarmed about his pay, Ernst Runde, appellee, and appellant met, in the absence of Knobel ; Ernst and appellant looked over their matters, and had a settlement of the amount which the firm owed appellant, and it was then and there agreed between the three, that appellant should pay appellee the \$150 owing him by the firm, and that this sum should be included in the mortgage debt of the firm to the appellant, making the whole amount of that debt about \$2,600. Appellee assented to the arrangement, and afterwards relied upon appellant for his pay. It appears by Knobel's testimony that, though not present at the arrangement, yet he fully assented to it.

It is not pretended by anything in the testimony, that appellant had let the mortgagors have any of the lumber after the making of the mortgage, which he agreed to. There is nothing which definitely shows, though fairly inferrible, that that claim was included in the settlement, nor was it definitely shown that the original debtors to appellee were to be discharged ; but the jury were warranted in finding, from the acts of the parties, that they were. The immediate parties to the transaction being all relatives, it was conducted without any particular formality, and much more, perhaps, was understood, than was definitely expressed.

Appellant virtually admits the settlement, but says that he agreed to pay appellee, in case the property brought enough over and above his debt to cover that claim. In this, he is corroborated by his son. This feature of the case also presents a conflict of evidence ; and whether the promise was absolute or conditional was a matter for the jury, and we must presume that they found the promise absolute.

It is a fair inference, from the evidence, that appellant, at the time of this arrangement, was about to take possession of the property under his mortgage. This is a fair presumption, from facts and circumstances appearing, and, no doubt, might have been clearly shown. The case appears to have been loosely tried, without any definite theory; but as facts appear, and inferences may be drawn from them in support of a theory of the case, upon which the verdict may well be sustained, and as the justice of the case is clearly with the appellee, we are bound to indulge in every reasonable presumption in support of the verdict.

The substance of the case, as it appears from undisputed facts, and legitimate inferences to be drawn from them, is simply this:

Knobel and Runde owed appellant, in the spring of 1869, about \$2,300. They gave him their note for \$3,400, secured by a mortgage upon property worth the full amount and more. For the difference, appellant agreed to let them have lumber, probably at his own price; but somehow, they had never received it.

The mortgagors, after the giving of the mortgage, became indebted to appellee for work he had done for them, to the amount of \$150. They had become embarrassed, and could not pay him; their property was all being engulfed in this mortgage transaction; one of them was brother to appellee; appellant was their uncle; he had proceeded, or was about to proceed, to take the property under the mortgage; to save the brother's honest claim for work, Ernst Runde enters into this arrangement. The just demand the firm had upon appellant, for the difference between their actual debt and that expressed in the mortgage, was still subsisting. That demand, as is fairly inferrible from the evidence, was compromised at \$150, and appellant agreed to pay the amount to appellee.

The property was sold under the mortgage by appellant, on the 23d day of November, 1869, through an agent, and bid in by appellant at \$1,600; the agent, himself, testifying that he

## Opinion of the Court.

did not think the sum bid was two thirds of its value, which appellant did not attempt to dispute, and still he refused to keep his promise with appellee, though he has obtained property worth, as appears by undisputed evidence, beside that of the agent, in the neighborhood of \$4,000, for a debt, which, excluding what he promised to pay appellee, he does not pretend was over \$2,300. To enable him to consummate the oppression, he interposes the Statute of Frauds.

"There is a general principle," says Browne, "which prevails in all cases under this branch of the Statute of Frauds, that, wherever the defendant's promise is, in effect, to pay his own debt, though that of a third person be incidentally guarantied, it is not necessary that it should be in writing. The statute contemplates the *mere* promise of one man to be responsible for another, and can not be interposed as a cover and shield against the actual obligations of the defendant himself." Browne on Frauds, sec. 165.

Again he says, "But if there is an understanding between three parties, that the defendant, in consideration of his own indebtedness, shall pay the plaintiff what is owing to him by another, it seems reasonable to regard the transaction as a mere payment by the defendant of his own debt, though the language of the parties should not be formal and precise to that effect." Sec. 166.

This promise is no more within the Statute of Frauds, than it would have been, if, after adjusting the claim which Knobel and Runde had against appellant, the latter had promised to pay the amount to them. *Barker v. Bucklin*, 2 Denio R. 45.

It is objected, that appellee could not recover under the common counts. The rule, as shown by the authorities cited by appellant's counsel, is this: If the promise is to be considered a collateral undertaking, then the declaration should be special; but, if it may be regarded as an original undertaking, then the declaration may be general. *Northrup v. Jackson*, 13 Wend. R. 85, and authorities there cited.

## Syllabus.

This we regard as an original undertaking, which the jury have found was absolute, to pay appellant's own debt, to appellee.

The judgment of the court below is affirmed.

*Judgment affirmed.*

LOUIS HARTMANN *et al.*

v.

HUBERT HARTMANN.

1. PARTITION—*of the lands of infants—a court of chancery the guardian of infants.* The right of partition of lands among several owners, and the consequent sale, if not susceptible of division, is not absolute in all cases.

2. So upon bill filed for partition, by a guardian, in the names of his wards, who were the owners of the fee, their father, who was made defendant, being tenant by the curtesy and consenting to the relief sought, it appeared the land was worth \$80 per acre, was underlaid with coal, and from its favorable location, likely to increase in value, and worth \$8 per acre rent. The land not being susceptible of division, would have to be sold, and no reason was shown why a partition should be had: *Held*, though the land was then less productive than the proceeds of a sale in money, yet it was a safer investment for the infant owners than money loaned, and, under the circumstances, their interests would be best subserved by refusing to permit a sale, which a court of chancery, in the exercise of its general supervision over the rights and interests of infants, ought to do.

3. SAME—*in view of the rule of distribution, under the life tables.* Another objection to the relief sought, in this case, was, that in distributing the proceeds of a sale according to the tables of mortality, which would afford the rule of distribution, the tenant by the curtesy, who was forty-one years of age, would take 67 52-100 per cent of the proceeds, and to the children 32 48-100 per cent. This would give the father too much as against the children.

4. LIFE-TABLES—*whether just in their application.* While life-tables may be resorted to, they can afford but a mere expectancy of the continuance of the particular life. They are, doubtless, correct in the aggregate, but can not be when applied to individual cases.

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Opinion of the Court.

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APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Mr. N. NILES for the appellant.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

Appellants filed their bill for partition. Appellee answered, and joined in the prayer for relief.

Appellants are minors, who sue by their guardian. They inherited the lands from their mother; and appellee is their father, and tenant by the curtesy.

The circuit court refused the relief prayed for.

From the report of the master, we find that the lands are valuable, are underlaid by coal, are worth three dollars per acre for cultivation, and that, though less productive, they constitute a safer investment than money loaned.

It is assumed that the right of partition of lands, and the consequent sale, if not susceptible of division, is absolute, and that it is arbitrary to refuse the prayer of the bill.

A general superintendence of infants is now exercised in courts of chancery, as a branch of general jurisdiction. Indeed, it is one of the peculiar duties of courts of equity to protect the rights of infants. From the earliest period, courts of chancery have been vested with a broad and comprehensive jurisdiction over the persons and property of infants. *Cowls v. Cowls*, 3 Gilm. 435; *Grattan v. Grattan*, 18 Ill. 167; *King v. King*, 15 Ill. 187.

The power and duty of the courts in this regard are clearly shown by Judge STORY, 2 Vol. Eq. Ju., Ch. 35. He says: "Whenever a suit is instituted in the court of chancery, relative to the person and property of the infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its especial cognizance and protection."

This proceeding has been instituted in behalf of the minors. No reason has been shown why partition should be granted.

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Opinion of the Court.

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We can not perceive that it would be for the interests of the minors to grant the division. A decree in their favor would necessarily result in a sale, for the proof shows that there could be no partition. The answer and affidavit of appellee, also disclose that his sole object is to obtain the money.

We are satisfied that the land is the safest investment. It can not be squandered, as too often happens with the money of infants. It is now worth \$80 per acre,—lying in one of the richest and fairest portions of the State,—and will probably increase in value. It is permanent and can not be lost, either by dishonesty or carelessness. Valuable coal mines, too, underlie its surface, and their development will probably prove a source of large profit.

We can not consent that this property, now safe from the fluctuations of prices, the accidents of money-lending, and the faithlessness of guardians, shall, without any necessity, be changed into a fund which may take wing and fly away. It might prove a grievous wrong to these children, of which we have no ambition to be guilty.

There is another serious objection to the relief asked for. If granted, the proceeds of the sale must be distributed according to the tables of mortality. These would give to the tenant by the curtesy, who is forty-one years of age, 67 52-100 per cent of the proceeds, and to the children 32 48-100 per cent. Thus the owner of the life estate would receive more than the owner of the fee simple.

These tables have been acted upon in other States; but this court said, in *Bonner v. Peterson*, 44 Ill. 253, "It is true that life tables might be resorted to, but they can afford but a mere expectancy of the continuance of that particular life. They are doubtless correct, in the aggregate, but can not be when applied to individual cases. The chances would be immensely against the expectancy coinciding with the result, with an individual."

These tables would give the father too much as against the children. The injustice is apparent.

## Syllabus.

The affirmance of the decree of the court below will best subserve the rights of the infants, and can work no serious injustice to appellee. He has a vested legal estate, which he may use or lease. *Shortall v. Hinckley*, 31 Ill. 219.

It is ordered that appellee pay the costs of this appeal.

The decree of the court below is affirmed.

*Decree affirmed.*

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JAMES A. PIGGOTT *et ux.*

v.

ASA SNELL.

1. RETURN OF SERVICE, *in chancery—its requisites.* The return of service upon a chancery summons was as follows: "I have served the within writ upon the within named Susan J. Piggott, by leaving a true copy of the same with James A. Piggott, a white person of the family, above the age of ten years, and informing the said James A. Piggott of the contents thereof, this 17th day of February, A. D. 1869:" *Held*, the return was defective in not stating that the copy was left at the usual place of abode of the defendant, and for that reason was insufficient to confer jurisdiction of her person. Where the service is by copy, the return must show a strict compliance with the statute.

2. MARRIED WOMEN—*whether service upon the husband sufficient.* The common law rule, that service of summons, against husband and wife, on the husband alone is good against both, is so far changed by the legislation in this State in respect to the right of property of married women, that whenever it is sought by a judicial proceeding to affect the rights of property of a married woman, she must be served with process.

3. And even at common law, it has been held necessary, where the plaintiff is seeking relief out of the separate estate of the wife, that the wife should be served.

4. So, in a suit in chancery against husband and wife, to foreclose a mortgage executed by both, and there was service upon the husband alone, it was held to be erroneous to decree a foreclosure against both the defendants, although it did not appear what was the nature of the wife's interest in the mortgaged premises.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. CHARLES D. HODGES, Judge, presiding.

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This was a suit in chancery, commenced by Asa Snell against James A. Piggott, and Susan J. Piggott, his wife, to foreclose a mortgage executed by the defendants on certain premises described in the bill. The default of defendants was entered and a decree rendered according to the prayer of the bill, and upon failure of the defendants to pay the sum found to be due, the premises were sold by the master in chancery to complainant, Snell, for the amount of the decree, interest and costs of suit. The defendants bring the record to this court and ask a reversal of the decree.

Messrs. WARREN, POGUE & AMES, for the plaintiffs in error.

Mr. M. B. MINER, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The only point relied upon for the reversal of the decree in this case is, the insufficiency of service of the summons on Susan J. Piggott.

The return of service as to her is as follows:

"I have served the within writ upon the within named Susan J. Piggott, by leaving a true copy of the same with James A. Piggott, a white person of the family, above the age of ten years, and informing the said James A. Piggott of the contents thereof, this 17th day of February, A. D. 1869.

JAMES H. BELT, Sheriff.

By C. S. OLNEY, Deputy."

The statute provides that service of summons in chancery shall be made by delivering a copy thereof to the defendant, or leaving such copy at his usual place of abode, with some white person of the family, of the age of ten years or upward, and informing such person of the contents thereof, which service shall be at least ten days before the return day of such summons.

This return is defective in not stating that the copy was left at the usual place of abode of Susan J. Piggott.

## Opinion of the Court.

According to the decisions of this court, in serving process by copy, the return of the officer must show a strict compliance with the statute, or the court will not obtain jurisdiction of the person. *Townsend et al. v. Griggs*, 2 Scam. 365; 2 Gilm. 581, *Montgomery et al. v. Brown*; *Boyland v. Boyland*, 18 Ill. 551; *Miller v. Mills*, 29 Ill. 431; *Cost et al. v. Rose et al.* 17 Ill. 276.

But it is insisted that service of summons against husband and wife, on the husband alone, is good service on both, and the husband is bound to answer for both, or judgment may be taken as confessed against both.

In *Ferguson v. Smith et al.* 2 J. Ch. R. 138, the chancellor says, "The general rule is, that the service of a *subpoena* against husband and wife, on the husband alone, is a good service on both, and the reason is, that the husband and wife are one person in law, and the husband is bound to answer for both; but where the plaintiff is seeking relief out of the separate estate of the wife, it has been deemed necessary, in a late case (9 Vesey, 488), that the wife should be served."

It does not appear, here, what is the nature of the wife's estate in the mortgaged premises. But whether it be her separate estate or not, according to the meaning of that term in a court of equity, recent legislation has made such innovation upon the common law governing the rights of property of married women, creating such a separation of the property interests of husband and wife, that it has effected a virtual repeal of some of the former rules of law pertaining to the subject; and we think that whenever the rights of property of a married woman are sought to be affected by a judicial proceeding, service of process should be had upon her.

The court below erred in taking the default of Susan J. Piggott, and in rendering the decree, until she was brought before the court. *Montgomery et al. v. Brown et al.* 2 Gilm. 581; *Leonard v. Admr. of Villars*, 23 Ill. 377.

The decree of the circuit court is reversed, and the cause remanded for further proceedings.

*Decree reversed.*

JACOB C. WIRTZ

v.

LOUIS M. HENRY *et al.*

1. PROCESS—to foreign county, against a sole defendant. The language of the act of 1861, authorizing process to be sent against a sole defendant into a county other than that in which the suit is brought, when the action is upon a contract that has been made in the county in which the action is brought, and the plaintiff is a resident of such county, precludes, by necessary implication, the sending of process to a foreign county against a sole defendant in any action not brought upon a contract.

2. So, to an action on the case brought to recover damages for alleged fraud and deceit practiced by the defendant in making a contract, and not for a violation of any of its terms, or to assert a right based upon the contract, it was *held*, the act did not apply.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action brought in the court below, by Lewis M. Henry and Robert K. Madden, against Jacob C. Wirtz, to recover damages for alleged fraud and deceit practiced by the defendant in inducing the plaintiffs to exchange a stock of goods for a certain patent right.

The summons in the cause was issued from the circuit court of Washington county, and directed to the sheriff of Cook county, and was served upon the defendant in the latter county.

The pleadings present the question, whether the summons was properly sent to a foreign county.

Mr. J. M. DURHAM and Mr. S. K. Dow, for the appellant.

Mr. P. E. HOSMER, for the appellees.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

The only question presented by this record is, whether process can be sent to a foreign county, against a sole defendant,

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Syllabus.

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in an action on the case for deceit. Under the act of 1861, process can be sent, against a sole defendant, into a county other than that in which the suit is brought, only in cases where the action is upon a contract that has been made in the county in which the action is brought, and the plaintiff is a resident of such county. The language of the act, by necessary implication, precludes the sending of process to a foreign county, against a sole defendant, in any action not brought upon a contract. The action in this case is not brought upon a contract. It grows out of a contract, it is true, but the action is brought to recover damages for the alleged fraud and deceit practised in making the contract, and not for a violation of any of its terms, or to assert a right based upon the contract.

The demurrer to the replication should have been sustained. The judgment is reversed and the cause remanded.

*Judgment reversed.*

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ILLINOIS CENTRAL RAILROAD COMPANY

v.

AMIRA NELSON.

1. RAILROADS—*passengers on freight trains*. It is not an unreasonable rule for a railroad company to require, that persons desiring to ride on freight trains, shall procure tickets sold expressly for such trains.

2. A railroad company, when carrying passengers on a freight train, are not required to draw the train up to the passenger platform to enable persons using that means of conveyance to pass to and from the cars, unless it has been the custom of the company so to do. If such was the usage, then they would be required to conform to it in all cases; otherwise, they have the right to receive passengers on their freight trains and discharge them at the usual place adopted for that mode of travel.

3. Where a person took passage on a freight train, without first procuring the kind of ticket required by the rules of the company to entitle him to ride on that character of train, it was *held*, the conductor had the

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Syllabus. Statement of the case. Opinion of the Court.

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right to require him to leave it at the usual place of getting on and off such trains, at a station.

4. **MEASURE OF DAMAGES**—*as against railroads and individuals.* When a corporation inflicts an injury upon a person, they can be required to compensate him for the wrong sustained only to the same extent that would be required of an individual engaged in the same business. The same rules apply to them as to individuals. .

**APPEAL** from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action on the case, brought by Amira Nelson against the Illinois Central Railroad Company, to recover for injuries to the plaintiff, caused by the alleged wrongful act of the defendants. A trial by jury resulted in a verdict for the plaintiff for \$50, on which judgment was entered. The defendants appealed.

Mr. GEORGE W. WALL, for the appellants.

Messrs. CASEY & DWIGHT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

It appears from the testimony in this case, that appellee, about the 27th of March, 1870, procured a ticket for a first class passage on appellants' road, from Ashley to Centralia. Appellee went into the passenger coach attached to a freight train on appellants' road. After starting the train, the conductor calling for tickets, found that appellee's was for a regular passenger and not for a freight train, whereupon he stopped the train and required appellee to leave the train.

It appears from the evidence, that appellants had adopted a regulation, that persons could only be carried on their freight trains by procuring tickets for that purpose, and they had so instructed their conductors, and had posted up, at the office where the ticket was obtained, a notice, that persons wishing to travel by freight trains, must procure such tickets. It is first insisted, that while a railroad may make all reasonable rules for the regulation of their business, this requirement

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Opinion of the Court.

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is unreasonable, and that a first class ticket entitled appellee to travel on any train on appellants' road ; while, on the other hand, it is claimed that the rule is reasonable, and the company have the right to insist upon its enforcement.

Railroads are created for the transportation of both persons and property, and from the time when first introduced into use, such bodies have provided different modes of carrying each. They have furnished coaches, constructed exclusively for passengers, and cars for the conveyance of freight. Their construction is entirely different, and there is a great difference in the two kinds of trains, and each is only adapted to the purposes of its construction.

The law has not required such corporations to carry passengers on their freight trains, nor freight in their passenger coaches ; it only requires them to carry both, leaving it to them to regulate the manner in which it shall be done, and custom has sanctioned the mode adopted. It has never, so far as we are aware, been held, that railroads are required to provide the means for carrying passengers on their freight trains ; that is left to their discretion, and it is a matter of choice with them whether or not they shall, for the accommodation of the public, adopt such a mode of transporting passengers ; and being a matter of choice, and not a duty, they may, in adopting such a mode, impose all reasonable rules consistent with the safety of passengers and the management of their business ; and we fail to see, that in permitting persons to travel on their freight trains, it is at all unreasonable to require them to procure tickets which permit them to travel on a train of that character. *Chicago & Alton R. R. Co. v. Flagg*, 43 Ill. 364. If the law required them to carry passengers in that mode, then a different rule would apply ; but, it being a matter of choice with them, they may impose reasonable terms, provided the rule is uniform. It may be, that in many cases it is necessary, in conducting their business, that they should have the right to say that none but persons having a particular kind of ticket should be permitted to travel in that

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Opinion of the Court.

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mode, and to prohibit their conductors from receiving fare on freight trains.

It is urged, that the court below erred in giving for appellee these instructions :

“If you believe, from the evidence, that plaintiff procured a first class ticket from Ashley to Centralia, and entered defendants’ cars, on which passengers were usually carried by defendants, to be carried from Ashley to Centralia, and was ejected by the conductor at a place other than the usual stopping place for passengers, as defined by these instructions, you will find for plaintiff. The usual stopping place means the platform, or place at the station where passengers get on and off the cars.”

“That, although, by the law of this State, if a passenger refuses to pay fare, the conductor may put him off, yet such passenger must be put off at some usual stopping place, and a usual stopping place means the platform, or place at the station where passengers get on and off.”

These instructions present the question whether, as a matter of law, the company, when carrying passengers on a freight train, are required to draw it up to the passenger platform to enable them to pass to and from the train. We have seen, that the company are not required, by law, to carry passengers by such trains, and when they do, they may adopt all reasonable rules consistent with the safety of passengers, and with their business ; that they may adopt a rule, that all persons desiring to travel in that manner, shall get upon and from the train at its usual place of stopping at the station, we entertain no doubt. It does not follow, that because they carry passengers in that mode, they should be compelled to furnish as fine and commodious coaches as on passenger trains, or that they shall, in other respects, make the same provisions for the accommodation of passengers, that are provided on their passenger trains. The latter are used almost exclusively for passengers, and hence have their regular stopping places for

their accommodation, and are required to stop them at the platform provided for their getting upon, or from such coaches.

Freight trains may not generally stop at the passenger platform, and as their business is the transportation of freight, they may, and no doubt do, usually stop at the freight depot, on another and different track from that upon which the passenger depot is situated. And, unless it appeared from the evidence, that it was the custom of freight trains on the particular road, to receive and discharge passengers at the platform of the passenger depot, it should not be required of them. If such was the usage, then they would be required to conform to it in all cases; otherwise, they have the right to receive and discharge passengers from their freight trains at the usual place adopted for that mode of travel, provided it is at a regular station. It should have been left to the jury to say, whether appellee was discharged at the usual place where passengers on freight trains pass to and from the cars. Not having the required ticket, appellee was not entitled to go as a passenger on the train, and the conductor had the right to require her to leave it, but only at the usual place of getting on and off that character of train, at a station. The court, therefore, erred in giving these instructions, without qualifying them so as to leave it to the jury to say whether the passenger platform was the usual place of getting on and off a freight train.

The case of the *Chicago & Alton R. R. v. Flagg*, *supra*, does not hold, that a freight train carrying passengers, must draw up to the passenger platform, but simply that the passengers must be put off at a station; and it does not, therefore, conflict with the views here expressed.

It is insisted, that appellee's fourth instruction is wrong. It is this:

"That in assessing the damages in this case, if you find defendants guilty, you are not confined to the same amount or



## Syllabus.

rules you would be if this suit was between individuals, as the public have an interest in such cases, which may be considered and looked to by you in assessing the damages in such a case."

We are aware of no adjudged case, or text writer, that has ever announced such a rule as this instruction contains. On the contrary, it has been repeatedly said, that the same rules must apply to corporations as to individuals. The law must secure them in their rights, precisely as it does individuals. The same, and only the same justice, must be meted to them as is to natural persons. When they owe money, they must be required to pay the amount due ; no more, no less. When they shall inflict an injury upon an individual, they must be required to compensate him for the wrong sustained to the same, and only to the same extent that would be required of an individual engaged in the same business. We can see no difference. The company only represents the stockholders, and all would say, that if they were sued as individuals, such an instruction would be unjust. And where is the difference in principle, whether they are deprived of their money by a judgment against the corporation, or against them as individuals ?

The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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JAMES LEMEN *et al.*

v.

JOSEPH G. ROBINSON, use, etc.

1. CHATTEL MORTGAGES—*of possession by mortgagor after maturity of the debt.* Where a chattel mortgage provided that the mortgagor should retain possession of the property until default in payment of the debt it

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was given to secure, and more than two months after the debt matured, the property still continuing in his possession, he sold and delivered to a third person, and no reason appeared why possession was not taken by the mortgagee at the proper time, it was *held*, the purchaser took the property free from any lien of the mortgage, even though he had actual notice that it was still unsatisfied.

2. FORMER DECISIONS. The authority of the case of *Hathorn et al. v. Lewis*, 22 Ill. 395, in so far as it is held that a chattel mortgage, although wanting in some of the essentials required by the statute, is nevertheless valid and binding as to subsequent purchasers with knowledge, is much shaken, if not entirely overruled, by subsequent decisions of this court, particularly that of *Frank v. Miner*, 50 Ill. 447.

APPEAL from the Circuit Court of Madison county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

M. P. Blackburn, on the 4th day of January, 1867, executed to Max. Weisinberger a chattel mortgage on certain property to secure the payment of a promissory note due on the 4th of July of the same year. The mortgage contained a provision that the property should remain in the possession of the mortgagor until default in the payment of the note, and was duly recorded. On the 10th of September, 1867, the debt not having been paid, the mortgagor, still having possession of the property, sold it to James Lemen. It being contended that Lemen had knowledge that the mortgage was still subsisting when he purchased, the question arises, whether the property in his hands was still subject to the mortgage.

Mr. CYRUS L. COOK, for the appellants.

Mr. DAVID GILLESPIE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of debt on a replevin bond executed by appellants to the sheriff of Madison county, for the use of Max. Weisinberger.

The action of replevin was brought by Lemen, and for some cause dismissed, and a writ of *retorno habendo* awarded.

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Opinion of the Court.

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The defense to the action on the bond was made under the act of March 1, 1847, which provides that, "in all actions upon replevin bonds, where the merits of the case have not been determined in the trial of the action of replevin in which the bond was given, the defendant may plead the above facts, and also his or her title to the property in dispute in the said action of replevin." Scates' Comp. 226.

The replevisor, Lemen, pleaded that he was the owner of the property in controversy at the time of the dismissal of the action of replevin, and that he was then lawfully entitled to its possession.

On this, an issue was made up, and on a trial by jury there was a verdict for plaintiff, and judgment accordingly. To reverse this judgment the defendants appeal.

It appears that M. P. Blackburn had, on the 4th day of January, 1867, conveyed the property in question, by chattel mortgage, to Weisinberger, to secure the payment of a note of that date, which matured on the 4th day of July thereafter. The mortgage contained the usual provision, that the mortgagor should remain in possession of the property until default in payment of the note it was given to secure. The property being in the actual possession of the mortgagor, Blackburn, on the 10th of September thereafter the same was purchased by appellant Lemen of Blackburn; whereupon Weisinberger took possession of the property, and Lemen replevied it.

There is evidence tending to show that Lemen had knowledge of the existence of this mortgage when he purchased, and the main question on the record is, with such knowledge, was Lemen precluded from purchasing the property of the mortgagor, it being in his possession at the time of the purchase? In other words, had the mortgagor any rights, two months and more after the maturity of the note it was given to secure, the property remaining in the possession of the mortgagor all the time?

This court has uniformly held, that a conveyance of personal property, the possession thereof remaining with the vendor, is

## Opinion of the Court.

a fraud *per se*, and incapable of explanation, unless such possession is provided for in the deed. *Thornton v. Davenport*, 1 Scam. 297; *Rhines v. Phelps*, 3 Gilm. 464; *Hanford v. Obrecht*, 49 Ill. 146.

And it has also been held, when the deed contains the provision that the property shall remain with the mortgagor until default in payment of the sum it may have been given to secure, and it is not taken into the possession of the mortgagee on the happening of the event, but remains with the mortgagor, the same is fraudulent as against creditors and subsequent purchasers. *Reed v. Eames*, 19 Ill. 595, and other cases cited in appellant's brief, decided by this court.

The property in question remained in the possession of the mortgagor more than two months after the note had matured, and no reason given why possession was not taken by the mortgagee at the proper time. In harmony with all previous decisions, we must hold the mortgage void, as against subsequent purchasers and creditors.

But it is urged that appellant Lemen knew of the existence of this mortgage, and purchased the property subject to the mortgage. This court did hold, in *Hathorn et al. v. Lewis*, 22 Ill. 395, that a chattel mortgage, though wanting some of the essentials required by the statute, was, nevertheless, valid and binding between the parties, and a party having actual notice of the mortgage and purchasing the same, was not a *bona fide* purchaser, and acquired no rights as against such mortgage.

This case is mainly relied on by appellee, but its authority is much shaken, if not entirely overruled, by subsequent decisions of this court, the strongest of which is the most recent case of *Frank v. Miner*, 50 ib. 444. Without reference to the case of *Hathorn v. Lewis*, *supra*, the court held that no other notice of a chattel mortgage was binding on any one, except notice by the record. Lemen, then, if he had notice of the mortgage, the same not having been recorded, could not be affected thereby.

The first instruction given for appellee was, consequently, erroneous. The mortgage was fraudulent and void, and good for no purpose.

The evidence that Lemen agreed to pay the debt for which the property was mortgaged, is too slight to find a verdict upon.

For the reasons given, the judgment is reversed and the cause remanded.

*Judgment reversed.*

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WILLIAM W. DRAPER

v.

MARY E. DRAPER.

SERVICE OF A SUMMONS after the return day thereof, is insufficient to give the court jurisdiction of the person of the defendant—is a nullity.

WRIT OF ERROR to the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

Messrs. MILLER & WATTS, for the plaintiff in error.

Mr. GEORGE F. O'MELVENY, and Messrs. CASEY & DWIGHT, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Numerous errors are assigned on the record, but we will only consider whether the circuit court had jurisdiction of the person of the plaintiff in error. If the court had not jurisdiction, the decree would be a nullity.

On the 22d day of August, 1870, Mary E. Draper filed her bill in the circuit court of Washington county, for a divorce. Upon filing the bill, a summons was regularly issued, directed to the sheriff of Washington county, and made returnable on the first Monday of October next thereafter; and subsequently,

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Opinion of the Court.

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on the 3d day of October, it was returned by the sheriff, endorsed, "not found."

On the 5th day of September, 1870, a second summons in said cause was issued, directed to the sheriff of Clinton county, and returnable on the first Monday of October next thereafter. This last summons was returned by the sheriff of Clinton county, duly served on the 13th day of October, 1870.

It is recited in the record, that on the 11th day of October, 1870, "It is ordered by the court, that this cause be removed from the docket without prejudice, costs herein having been paid by the plaintiff." It does not appear upon whose motion, whether upon the motion of any one, the above order was made, and the cause stricken from the docket.

On the 4th day of April, 1871, a notice was served on the plaintiff in error by the counsel for the defendant, by which he was notified that a motion would be made at the April term of said court, to reinstate the case on the docket. The plaintiff in error did not appear, and the cause was accordingly placed on the docket and proceeded to final decree.

It is not pretended, that there was any service on the first summons issued in the cause. The service on the second summons, issued to Clinton county, was insufficient to confer jurisdiction. It was not served until ten days after the return day. The writ had then no vitality; it had spent its force, and the service was a nullity. *Hitchcock v. Haight*, 2 Gilm. 603.

It is insisted, that the plaintiff entered a motion to dismiss or strike the cause from the docket, and thereby entered his appearance in said cause for all purposes. The record does not disclose, that the plaintiff in error ever made any such motion, or any other motion in the circuit court.

There being no service, and no appearance by the defendant in the circuit court, that court did not have jurisdiction to pronounce the decree that it did.

For the error indicated, the decree is reversed and the cause remanded.

*Decree reversed.*

JOHN YOUNG

v.

JAMES T. COOPER *et al.*

**ATTACHMENT—*whether it will lie.*** A suit by attachment will lie upon a judgment recovered in the same court in which the suit is brought, and this although the plaintiff is entitled to execution upon the judgment at the time of issuing the writ. An indebtedness upon a judgment comes clearly within the meaning of the first section of the attachment act.

**APPEAL** from the Circuit Court of Madison county ; the Hon. JOSEPH GILLESPIE, Judge, presiding.

On the 14th day of December, 1870, the following affidavit was made before the clerk of the Circuit Court of Madison county, viz: "John Young, on oath, states that Jesse Stanley and James T. Cooper are indebted to him in the sum of five hundred and seventy-seven and seventy-five one hundredths dollars, (\$577.75) upon a judgment rendered against them in his favor in the Madison circuit court, with legal interest on said judgment from the May term of said court, A. D. 1870 ; that James T. Cooper, one of the above named parties so indebted to this affiant, has fraudulently conveyed his property so as to hinder and delay his creditors, within two years prior to the filing of this affidavit, and that said Cooper has fraudulently disposed of his property so as to hinder and delay his creditors within two years, and affiant prays that an attachment may issue against the said James T. Cooper and Jesse Stanley as is provided by law."

On the same day, Young filed his bond in said court, and the clerk issued the writ of attachment.

The writ of attachment commands the sheriff to attach the property, etc., of James T. Cooper, and also to summon the Manhattan Insurance Company, the Lorillard Insurance

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Statement of the case. Opinion of the Court.

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Company, and Franklin Hewit as garnishees. The sheriff made the following return on said writ: "I have duly served the within by reading and leaving two copies thereof to the within named Franklin Hewit, president of the within named Manhattan Insurance Company; Lorillard Insurance Company, non-residents, this 21st day of December, 1870."

At the February special term of said court, a motion was made by the defendants to quash the writ of attachment, for the reason that an attachment could not be sued out on a judgment already obtained by the same plaintiff against the same defendant, when the judgment was in full force and effect, and in the same court. The court sustained the motion, to which the plaintiff then and there excepted, and gave judgment against the plaintiff for costs.

The plaintiff appeals.

MR. CHARLES P. WISE, for the appellant.

MR. DAVID GILLESPIE, for the appellees.

MR. JUSTICE McALLISTER delivered the opinion of the Court:

This was a suit commenced by attachment, in the Madison circuit court. The appellant's affidavit for the writ, set out a judgment recovered by him at the May term, A. D. 1870, of the same court, against appellee and one Stanley for \$577.75.

Upon motion of appellee, the court below quashed the writ, upon the ground that a suit by attachment will not lie upon a judgment recovered in the same court where the suit is brought.

That an action of debt will lie upon the judgment of the same court in which such action is brought, even though the plaintiff in the judgment is entitled to execution upon it, at the time of bringing his action, was decided by this court in *Greathouse v. Smith*, 3 Scam. R. 541, and the propriety of the decision, it is believed, has never been questioned.



## Syllabus.

An indebtedness arising upon a judgment is as fully within the meaning of the first section of the attachment act (R. S. 63,) as any other recognized by the law.

The judgment of the circuit court, dismissing the attachment, is reversed and the cause remanded.

*Judgment reversed.*

## MUTUAL BENEFIT LIFE INSURANCE CO.

v.

MARY P. ROBERTSON.

1. **LIFE INSURANCE—renewal receipt.** Where a policy is issued to insure the life of a person for the term of life, in consideration of the premium paid, and to be paid annually during its continuance, a receipt given for the annual premium, and which recites that the policy was thereby continued in force for another year, does not constitute a new contract but merely operates to continue the old one.

2. **SAME—effect of misrepresentation.** The wife of the party whose life was insured, and for whose benefit the policy was obtained, stated to the agent of the company at the time of procuring such a renewal receipt, in answer to his inquiry on the subject, that her husband, who was absent in another State, had written to her and that he was in his usual health: *Held*, in an action on the policy, the statement being verbal, and not referred to in the policy, should be deemed to have been a mere representation. It was independent of the contract, and collateral to it. It may have been untrue, and yet not avoid the policy. To give it that effect it must be proved to have been material, and that it induced the risk.

3. But even the failure to communicate a material fact, unknown to the assured, will not vitiate a policy. The undertaking is merely to represent, truly, facts within the knowledge of the assured.

4. **SAME—of the allegations and proofs.** In an action upon a policy of life insurance, the introduction of the policy, and receipts for the annual premiums required by its terms to be paid, and proof of the death of the party whose life is insured, will make a *prima facie* case in favor of the plaintiff. He is not bound to set out the application and prove its truth.

5. **SAME—of a warranty by the assured.** A warranty is in the nature of a condition precedent; it must appear on the face of the policy; or, if on

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| 77a | 445 |

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Syllabus. Opinion of the Court.

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another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty can not be created nor extended by construction.

6. *INDECOROUS LANGUAGE towards the Judge below.* Where counsel employ in their printed arguments in this court, improper and indecorous language respecting the judge below, such arguments will be stricken from the files, and such other action taken as will protect the circuit judges from like aspersions.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Messrs. SNYDER & DILL, for the appellant.

Mr. WM. H. UNDERWOOD, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This is an action of assumpsit, upon an insurance policy.

The declaration contains two special, and the common counts.

The general issue was filed, and also special pleas as follows:

First, that the policy was originally procured by fraud and misrepresentation; second, that it became void on the 19th day of March, 1869, in consequence of the non-payment of the premium, and its renewal was effected by fraud and misrepresentation.

The life of the deceased was insured in 1866, for the benefit of his wife, the appellee, and a renewal was procured from year to year.

Appellee recovered a judgment for the amount of the policy and interest.

The assured died in January, 1870. There was introduced; in evidence, a receipt for the annual premium, of date March 19th, 1869, signed by the proper officers, which, by its terms, continued the policy in force for one year from its date. The

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Opinion of the Court.

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language of this receipt is, "Policy on the life of Byrd M. Robertson is hereby continued in force for one year from date, settlement of the premium having been made." The policy was issued to insure the life of the deceased for the term of life, in consideration of the premium paid, and to be paid in each year during its continuance.

This receipt did not make a new contract ; it was merely evidence of compliance with the condition of the policy. It did not alter its terms or legal effect, or change the parties ; it was not an independent contract, but a continuance of the old one.

A *prima facie* case was made in behalf of appellee, by the introduction of the policy, the renewal receipt, and proof of the death.

It is contended, that the continuance of the policy was procured by fraud. This is the allegation of the plea, but it is wholly unsustained by the proof.

The premium was due in March, but it was not all paid until in November, and the receipt was actually given in November, and ante-dated. The agent had occasionally advanced it — had assured appellee that it need not be paid on the exact day named in the policy ; had induced her to believe that it had been advanced, and had received a part of it in July. He testified that he made inquiry of her as to where, and how, her husband was, in November. She replied, that he was in the State of Missouri ; she had just received a letter from him, and that he was in his usual health.

Dr. Perryman, the medical examiner of the company, testified, that in a conversation with appellee, in November, she said she had received a letter from her husband, stating that he was well.

The policy, introduced in evidence, stated that it was made in consideration of the representations contained in the application, and of the premium, and "that if the declaration, made by or for the assured, and bearing date March 19th, 1866, and upon the faith of which this agreement is made, shall be

found in any respect untrue, then this policy shall be void ;" and that upon failure to pay the annual premium on the days mentioned, the policy should cease and determine.

Conceding that the representations contained in the application for the policy, were made warranties by the reference to them in the policy, still we can not say that they were untrue. The application was not introduced, and we are not advised, by the evidence, of its contents. We can not determine, that there was either misrepresentation or concealment of facts. For aught that appears in this record, there may have been a full disclosure of every fact material to the risk, and a true answer to every question propounded.

Appellee was not bound to set out the application and prove its truth. This paper must have been in the custody of appellant. The company might have introduced it, and proved its representations to be false. We can not surmise, that it contained a warranty of good health, in the absence of proof. *New England Fire and Marine Insurance Co. v. Wetmore*, 32 Ill. 221.

There was, then, no warranty of good health. A warranty is in the nature of a condition precedent ; it must appear on the face of the policy ; or, if on another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy ; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty can not be created nor extended by construction. *Reynolds Life Insurance*, 85 *et seq.* ; *Campbell v. New England Insurance Co.* 98 Mass. 381 ; *Burritt v. Saratoga Insurance Co.* 5 Hill, 188 ; *Jefferson Insurance Co. v. Cotheal*, 7 Wend. 72.

The only proof to sustain the charge of fraud and misrepresentation, was the remark of appellee to the agents of the company, that she had received a letter from the deceased ; that he was in Missouri, and in his usual health. The deceased was a traveling agent, and the fact of his absence from home was known to the agents of the company.

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Opinion of the Court.

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This statement was verbal, and is not referred to in the policy, and must be deemed to have been a mere representation. It was independent of the contract, and collateral to it. It may have been untrue, and yet not avoid the policy. It must be proved to have been material, and that it induced the risk. *Farmers' Insurance Co. v. Snyder*, 16 Wend. 481.

Did it induce the risk? The evidence satisfies us to the contrary.

The renewal receipt, though dated the 19th of March, was, in fact, executed on the 11th of November. The premium should have been paid on the 19th of March. Notwithstanding this provision in the policy, a part of the premium was received by the agent of the company, in July; and he had induced appellee to believe that it had been advanced. An advancement of it had previously been made by the agent.

The medical examiner of the company, on the 2d day of November, gave a certificate that the assured was then in good health. He had made a careful and personal examination of him, in March, and in September or November, 1869. Besides, appellee testified that she made no application for, and did not know of the necessity of, such a certificate. We think these acts of the agent were the result of their own knowledge, and were not prompted by the representation of appellee.

Their acts were voluntary; the premium was received by the agent, and forwarded to, and accepted by, the company. The agents acted within the scope of their authority; the company ratified these acts. The right of forfeiture was thus waived, and we can not encourage the perpetration of a fraud by permitting the company to repudiate the conduct of its agents. The condition of forfeiture, in case the annual premium is not paid on the day named, is for its benefit solely, and a waiver of a strict compliance continues the obligation. *F. & M. Insurance Co. v. Chesnut* 50 Ill. 111; *Ætna Insurance Co. v. Maguire*, 51 Ill. 342; *Miller v. Phoenix*, 27 Iowa, 203; *Banton v. American Life Insurance Co.* 25 Conn. 542; *Wing v. Harcey*, 27 Law and Eq. 140.

## Opinion of the Court.

But the evidence wholly fails to stamp the statement of appellee as a misrepresentation. There is no proof whatever, that she had any knowledge of the alleged sickness of her husband; she communicated all that she knew; she acted in perfect good faith. The failure to communicate a material fact, unknown to the assured, will not vitiate a policy. The undertaking is merely to represent, truly, facts within the knowledge of the assured.

In *Daniels v. Hudson River Fire Insurance Co.* 12 Cush. 417, Chief Justice SHAW said: "Misrepresentation is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter; or, which he states positively as true, without knowing it to be true, and which has a tendency to mislead—such fact, in either case, being material to the risk."

In the case at bar, there is entire absence of any intent at deception. The representation was not of a positive character, but simply the communication of the contents of a letter. It was not the assertion of a fact, in reply to information sought, and could not have misled the agent. The representation did not induce the risk, and under the circumstances, was immaterial, and can not vitiate the policy. *Carter v. Boehm*, 3 Burr. 1905; *Biays v. The Union Insurance Co.* 1 Wash. Cir. C. R. 506; *Lord v. Dall*, 12 Mass. 115; *Swete v. Fairlie*, 6 Carr. & Payne, 1; *Huguenin v. Bailey*, 6 Taunton, 186.

All the evidence, then, as to the last sickness of the deceased, and the cause of his death, was wholly irrelevant, and the errors assigned thereupon are immaterial. The admission, as well as the exclusion of testimony, in regard to such matter, was error without prejudice. Such action of the court could not change the law of the case, or affect the propriety of the verdict.

Counsel for appellant have indulged in language, in their printed argument, highly improper and indecorous to the

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judge on the circuit. Abuse can never rise to the dignity of argument. If such language had been used in an oral argument, counsel would have been peremptorily silenced.

For like offense in the future, the brief will be ordered to be stricken from the files, and such other action taken as will protect judges of the circuit court from like aspersions.

The laws must be respected; they constitute the basis of civil society. For the maintenance of this respect, a gentlemanly courtesy should ever be observed towards those who, for the time, administer them.

The judgment is right, and must be affirmed.

*Judgment affirmed.*

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## CITY OF CENTRALIA

v.

## ANDREW SCOTT.

1. INCORPORATED CITIES—*liability for injuries resulting from defective highways.* Chartered cities are liable for injuries, resulting from neglect to keep their streets in proper condition.\*

2. SAME—*of contributory negligence.* In an action against a chartered city, to recover for injuries received by the plaintiff, by reason of being thrown from his wagon in going over a defective crossing, while his horses were running away, it was *held*, the fact, that one of the plaintiff's horses had previously, on several occasions, run away, was not, of itself, a conclusive reason why the plaintiff should not recover.

3. Such circumstance was properly left to the jury for them to consider, and weigh it in connection with the alleged negligence of the defendant, and in determining the degree of the plaintiff's care or negligence in driving his team.

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\*See also the cases of *President and Trustees of the town of Mechanicsburg v. Meredith*, 54 Ill. 84, and *City of Peru v. French*, 55 Ill. 817. And see the case of *Town of Waliham v. Kemper*, 55 Ill. 346, where a distinction is taken in regard to their liability for injuries, resulting from the bad condition of highways, between chartered cities, and towns established by law as a civil division of a county, merely.

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Opinion of the Court.

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WRIT OF ERROR to the Circuit Court of Marion county ;  
the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. HENRY C. GOODNOW, for the plaintiff in error.

Messrs. CASEY & DWIGHT, for the defendant in error.

Per CURIAM : This was an action brought by defendant in error, against the city of Centralia, for injuries received in consequence of being thrown from his wagon, in going over a defective crossing, while his horses were running away. The jury found for the plaintiff a verdict of \$30, for which the court gave judgment.

Counsel for plaintiff in error denies the liability of municipal corporations for injuries arising from the bad condition of streets, but so far as chartered cities are concerned, the question is not an open one in this court.

We see no grounds for reversing this judgment. The instructions properly gave the law to the jury, and although the evidence, as to the condition of the crossing, is conflicting, the jury have passed upon it, and there is no good reason for disturbing their verdict. They were certainly not actuated by prejudice or passion, as is evident from the very moderate damages they allowed.

It is urged, that one of the plaintiff's horses had, on several occasions, run away. We do not, however, think this fact, of itself, is a conclusive reason why the plaintiff should not recover, and the court below called the attention of the jury to this circumstance, in one of the instructions given for the defendant, and left it to them to weigh it, in connection with the alleged negligence of the defendant. Almost all horses are liable to take fright and run away, and we can not lay it down as a legal proposition, that a plaintiff, in a case like the present, can not recover, merely because he is driving a pair of horses, one of which has, on various occasions, run away, if he has used reasonable care and diligence at the time the



## Syllabus.

accident occurred. The degree of negligence involved, in driving a horse that has before run away, can be properly left to the determination of the jury, as was done in the present case.

*Judgment affirmed.*

## ILLINOIS CENTRAL RAILROAD COMPANY

v.

JESSE L. ABLE.

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72a 865

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89a 767

1. RAILROADS—*carrying passengers beyond the proper station.* If a railway passenger, holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination.

2. SAME—*where passenger leaves the train while in motion.* But if such passenger voluntarily leaps from the train when in rapid motion, or leaves it under circumstances which would necessarily or probably render such an act perilous, and receives bodily injury, he could not recover damages for the injury, because it would be the result of his own want of ordinary care.

3. Though in case the passenger is not allowed a reasonable opportunity to alight, there being a slight stoppage of the train, but he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and nevertheless bodily injury follows, in such case the passenger would be entitled to recover damages for the injury,—the passenger having a right to construe the momentary halt of the train, at the station, as an invitation to alight, and in his attempt to make use of such opportunity when not attended with apparent danger, being chargeable with no appreciable negligence, in comparison with the flagrant breach of duty on the part of the company in neglecting to afford a reasonable opportunity to leave the train in safety.

4. JURY—*finding a verdict by compromise.* Where a jury in their retirement, in considering their verdict, as appeared from the affidavit of the officer having them in charge, after agreeing to find for the plaintiff, but

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Opinion of the Court.

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differing widely as to the amount of damages, agreed that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and put the slip in a hat, and that the sum obtained by adding the amounts together and dividing by twelve, should be their verdict, which was done, and a verdict returned accordingly: *Held*, that while jurors may resort to such a process as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement, that such a result shall be their verdict, will vitiate a verdict found under and by virtue of such an agreement; and although one of the jurors swore there was considerable consultation after the process, and that each juror agreed upon the result thus reached as his verdict, it was still regarded that the verdict had been found under the pressure of the agreement.

APPEAL from the Circuit Court of Effingham county; the Hon. H. B. DECIUS, Judge, presiding.

Mr. GEORGE W. WALL, for the appellant.

Mr. O. B. FICKLIN, JOHN SCHOLFELD, and Messrs. WOOD & BARLOW, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

If a railway passenger, holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination. But on the other hand, if he voluntarily leaps from the train when in rapid motion, or leaves it under circumstances which would necessarily or probably render such an act perilous, and receives bodily injury, he could not recover damages for the injury, because it would be the result of his own want of ordinary care. Cases might occur, however, in which a reasonable opportunity to alight has not been given to a passenger, and where he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man

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of ordinary prudence and judgment, and nevertheless bodily injury follows; in such cases the passenger would be entitled to recover damages for the injury, because the railway company has committed a flagrant breach of duty, and the passenger is chargeable with no appreciable negligence. He has a right to construe the momentary halt of the train at the station as an invitation to alight, and to make use of the opportunity thus afforded where not attended with apparent danger, holding the company responsible if it does not furnish reasonable time to leave the train with safety.

The action of the court in giving, refusing, and modifying instructions, was in substantial accordance with these principles.

It is urged, that the verdict is not sustained by the evidence, but we refrain from the consideration of that point, as there is another upon which the case must be sent to another jury. It appears, by the affidavit of the officer having in charge the jury, that after agreeing to find for the plaintiff, they differed widely as to the amount of damages, and it was then agreed that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat; that the amounts should then be added together, and their sum divided by twelve, should be the verdict. This was done, and a verdict returned accordingly.

It is true, a juror swears that there was considerable consultation after this was done, and that each juror agreed upon the result thus reached, as his verdict. He does not, however, deny that an agreement was made, such as is stated in the officer's affidavit, and we can not doubt it was that agreement which controlled the amount of the damages. The rule upon this matter is well settled. It is, that while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that such a result shall be the verdict, will vitiate a verdict found

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Syllabus. Statement of the case.

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under and by virtue of such an agreement. *Dunn v. Hall*, 8 Blackf. 32; *Dana v. Tucker*, 4 J. R. 487; *Harvey v. Rickett*, 15 J. R. 87.

This rule is so reasonable, as to need no comment.

As this verdict was evidently found under the pressure of such an agreement, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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MARGARET KESLER *et al.*

v.

WILLIAM PENNINGER.

1. INFANTS *can only appear by guardian*. It has been held that a minor can only appear to defend a suit by guardian, and not in person or by attorney.

2. GUARDIAN AD LITEM *must be appointed*. It is clearly the duty of courts to appoint a guardian *ad litem* for minor defendants, when there is not a guardian appearing and defending for them. And in such a case it is error to proceed to trial without appointing a guardian *ad litem*.

WRIT OF ERROR to the Circuit Court of Union county; the Hon. JOHN H. MULKEY, Judge, presiding.

This was an action of ejectment, brought by William Penninger against Margaret Kesler and others, to recover the possession of certain premises, of which the plaintiff claimed to be the owner in fee. A trial by jury resulted in a verdict and judgment for the plaintiff. The defendants bring the record to this court.

Mr. JOHN DOUGHERTY, for the plaintiffs in error.

Messrs. CRAWFORD & WARE and Mr. G. W. WALL, for the defendant in error.

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Opinion of the Court.

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Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of ejectment, commenced by Penninger against plaintiffs in error. It is not disputed that John Kesler owned the land in fee at the time of his death. He, by will, devised the land in controversy to his wife during her natural life, and at her death, to his grand daughter, Susan Clementine Penninger, in fee. Her marriage with plaintiff below was proved, also her death, leaving a child, the fruits of the marriage, surviving her. The death of the child was also proved, and that the widow of testator had died. And plaintiff below now claims to own the land in fee as the heir at law of his deceased child.

It appears that all the defendants in the suit below were minors, and it fails to appear that any guardian *ad litem* was appointed to defend for them, or that they had a guardian who appeared in the case. In *Peak v. Shasted*, 21 Ill. 137, it was held, that a minor can only appear, to defend a suit, by guardian, and not in person or by attorney. The statute has, in numerous cases, authorized and fully empowered the courts to appoint a guardian *ad litem* for minor defendants, and it is clearly the duty of the court to do so, when there is not a guardian appearing and defending for them. And in such a case it is error to proceed to trial without appointing a guardian *ad litem*. It is not a question whether the minors are liable for a trespass in entering the close in controversy, but it is, whether that question can be tried until there is service upon the regular guardian or a guardian *ad litem* has been appointed.

We have seen that it is error to try such a cause without a guardian for the minor defendants, and the judgment must be reversed and the cause remanded.

*Judgment reversed.*

## FRIEDRICH A. LIETZE

v.

JOHN CLABAUGH *et al.*

*PARTIES—in chancery—when new party disclosed, necessity of amending bill.* A, being the equitable owner of the first of two promissory notes, secured by a mortgage, filed a bill to procure a sale of the mortgaged premises, making B a defendant, and alleging that the second note had been assigned to him, that he had obtained judgment on it, and sold and bid in the mortgaged premises under his judgment. B answered, setting up that in doing this he was acting merely as agent for C, to whom the note, judgment and certificate of purchase belonged and had been assigned: *Held*, the interest of C, in the subject matter of the litigation being thus disclosed, the complainant should have amended his bill and made him a party, and to proceed to final decree without giving him an opportunity to protect his interests, was error for which the decree should be reversed.

APPEAL from the Circuit Court of Clinton County; the Hon. SILAS L. BRYAN, Judge, presiding.

This was a bill in chancery, filed by John Clabaugh and Anthony Hubert against David Mallen, Anthony Zuriseller, and Friedrich A. Lietze, to compel said Zuriseller to sell certain real estate under a mortgage executed by David Mallen to said Zuriseller. Upon default of Mallen and Zuriseller, they having failed to answer, and upon trial by the court upon bill, answer of Lietze, exhibits and proofs, the court decreed that Anthony Zuriseller proceed, within thirty days, to advertise and sell said mortgaged premises, and out of the proceeds of said sale, after having first paid the costs and charges of sale, that he pay to the complainants the amount found to be due them, to wit: the sum of \$790, and that in default thereof, the master in chancery make said sale in accordance with the terms and conditions of the mortgage.

Mr. FRIEDRICH A. LIETZE, appellant, *pro se*.

Mr. G. VAN HOOREBEKE, for the appellees.

## Syllabus.

Per CURIAM: The complainants in this case being the equitable owners of the first of two promissory notes, secured by a mortgage, filed a bill to procure a sale of the mortgaged premises, making Lietze, the appellant, a defendant, and alleging that the second note had been assigned to him, that he had obtained judgment on it, and had sold and bid in the mortgaged premises under his judgment. Lietze answered, setting up that in doing this he was acting merely as agent for one Hume, to whom the note, judgment, and certificate of purchase belonged and had been assigned. The interest of Hume in the subject matter of the litigation being thus disclosed, the complainant should have amended his bill and made him a party. *Herrington v. Hubbard*, 1 Scam. 569. This decree may seriously prejudice his interests, and he should have an opportunity to protect them. The decree is reversed and the cause remanded.

*Decree reversed.*

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WESLEY HOYER *et al.*

v.

THE TOWN OF MASCOUTAH.

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|-----|-----|
| 60  | 137 |
| 25a | 75  |
| 59  | 137 |
| 31a | 475 |

1. **PENALTY**—*proceeding to collect, whether civil or criminal.* It has been held that a proceeding to collect a penalty for the violation of a town ordinance is a civil suit—that such a penalty can not be recovered in any criminal proceeding.

2. **SAME**—*where offense charged is assault and battery.* Where it is sought to recover such a penalty, the fact that the offense charged is assault and battery, does not change the character of the proceeding. The town only acquires jurisdiction because the offense is prohibited by ordinance.

3. **APPEALS, in such cases.** In all such cases, appeals from justices of the peace must be allowed and perfected under the provisions of the statute allowing appeals in civil cases.

4. **AMENDMENT of appeal bond.** And if the appeal bond should be found to be defective, it is the duty of the circuit court to allow amendments, as in civil cases.

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Opinion of the Court.

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WRIT OF ERROR to the Circuit Court of St. Clair county ;  
the Hon. JOSEPH GILLESPIE, Judge, presiding.

Messrs. WINKELMAN & BONEAU, for the plaintiffs in error.

Mr. BENJAMIN MATTICE, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was an action originally commenced before a justice of the peace by the town of Mascoutah against the plaintiff in error, for an alleged violation of an ordinance of said town. A trial was had before the justice of the peace, which resulted in a judgment against the plaintiff in error, from which he prayed an appeal to the circuit court, and filed his bond in accordance with the provisions of the statute allowing appeals in civil suits.

At the October term of the circuit court of St. Clair county, A. D. 1870, the counsel for the defendant in error entered a motion to dismiss the appeal, on two grounds: 1st, that, inasmuch as this was a prosecution for assault and battery, under the ordinances of the town, the appeal bond was insufficient in not containing a condition providing for the payment of a judgment that might be rendered upon a plea of guilty ; and, 2d, that the appeal bond was entered into before and filed with the justice of the peace who tried the cause, and was not entered into before and filed with the clerk of the circuit court, as the statute directs in cases of assault and battery. The plaintiffs in error asked leave to amend the appeal bond, which leave the court refused to grant, and dismissed the appeal.

The decision of the court, refusing leave to amend the appeal bond, and dismissing the appeal, is now assigned for error.

It has been repeatedly held by this court, that a proceeding to collect a penalty for the violation of a town ordinance is a civil suit. Such a penalty can not be recovered in any criminal proceeding. *Town of Jacksonville v. Block*, 36 Ill. 507 ; *Graubner v. City of Jacksonville*, 50 Ill. 87. The fact that the



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Syllabus.

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offense charged was assault and battery, does not change the character of the proceedings. It is still a civil suit. The town only acquires jurisdiction because the offense is prohibited by ordinance.

In all such cases appeals must be allowed and perfected under the provisions of the statute allowing appeals in civil cases before a justice of the peace.

If the appeal bond should be found to be defective, it is the duty of the court to allow amendments as in civil actions.

For the reasons indicated, the judgment is reversed and the cause remanded.

*Judgment reversed.*

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CLEMENTZ HORAT *et al.*

v.

GEORGE JACKEL, for the use of George Meissel, and

SAME

v.

SAME, for the use of Henry Vetter.

1. GARNISHMENT—*affidavit, before whom sworn to.* In a garnishee proceeding upon a judgment of the circuit court, it is not necessary that the affidavit, upon which the process is issued, be sworn to before the clerk of the court, but the same may be properly subscribed and sworn to before a justice of the peace.

2. SAME—*when final judgment may be rendered—act of 1861.* In such a proceeding, upon default of the garnishee, it is error to render final judgment against him at the return term of the writ. A conditional judgment only should be entered, and a *scire facias* issued against the garnishee, returnable to the next term of the court, to show cause why the judgment should not be made final. The act of February 22, 1861, has not altered the practice in this respect.

WRITS OF ERROR to the Circuit Court of Madison county.

These were garnishee proceedings, commenced by George Miessel and Henry Vetter, against Clementz Horat and others, upon judgments obtained by them in the circuit court of Madison county against George Jackel, and on which executions had been issued, and returned no property found. The defendants failing to appear at the return term of the writ, their default was entered and final judgment rendered against them, to reverse which judgment they bring the record to this court.

Messrs. L. & L. DAVIS, for the plaintiffs in error.

Mr. J. H. YAGER, for the defendants in error.

Per CURIAM: These were garnishee proceedings upon judgments, upon which executions had been issued, and returned "no property found."

The first objection taken to the proceedings is, that the affidavits upon which the garnishee process was sued out, were sworn to before a justice of the peace, instead of before the clerk of the circuit court, as required by the statute.

A similar objection was taken in *Fergus v. Hoard*, 15 Ill. 357, that the affidavit upon which the *ca. sa.* had issued in that case, was sworn to before the clerk of the court, by whom the writ had been issued, instead of a justice of the peace, as provided in section 1, ch. 52 R. S.; and the court said, the objection was answered by section 3, ch. 76 R. S., which expressly authorized clerks "to administer oaths or affirmations to witnesses and others, concerning anything pending, or proceeding commenced or to be commenced before them;" that this provision authorized the clerk to administer the oath.

The same answer may be made to the present objection, that a subsequent clause of the same section expressly authorizes all justices of the peace "to take affidavits and depositions concerning any matter or thing, process or proceeding, depending, or to be commenced in any court, or before any justice of

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Opinion of the Court.

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the peace, or on any occasion wherein such affidavits or depositions are authorized or required by law to be taken." This provision authorized the justice of the peace to take the affidavit. Another error assigned is, in rendering final judgment against the plaintiffs in error, at the return term of the garnishee summons.

The statute under which these proceedings were had, provides, that the garnishee shall be examined and proceeded against in the same manner as required by law against garnishees in original attachments. The attachment law provides, in case the garnishee shall fail to appear and make discovery, a conditional judgment shall be entered against him, and a *scire facias* shall be issued against him, returnable to the next term of the court, to show cause why the judgment should not be made final.

Only a conditional judgment should have been rendered against the garnishees at the return term, and it was erroneous to enter a final judgment against them at that term.

The act of February 22, 1861, has not, as is contended, altered the practice in this respect.

The only change it makes in the previous law is, that the garnishee process may be taken out in vacation, making it returnable like other process, and providing that no judgment by default shall be rendered, unless the process shall have been served ten days before the return day.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

ARAM PRIMM *et al.*

v.

THE CITY OF BELLEVILLE *et al.*

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| 59  | 142 |
| 145 | 327 |
| 59  | 142 |
| 197 | 368 |

1. **TAXATION** for corporate purposes—application of the rule of uniformity—constitutionality of the charter of the city of Belleville. The rule of equality and uniformity of taxation prescribed by the constitution must be applied, not only to the rate of taxation, and to the district to be taxed, but also to all the property subject to taxation.

2. The charter of the city of Belleville provides that the city council may lay off the city into districts for the construction of sewers, and levy and collect a special tax on the real estate within any district to be drained. The city council, by ordinance, undertook to exempt improvements on the real estate from such special tax: *Held*, the ordinance, in exempting improvements upon the real estate, was a violation of the charter. Fixed and permanent buildings upon land form a part of it, and should be estimated in assessing its value for purposes of taxation.

3. It was likewise beyond the constitutional power of the legislature to make the discrimination in favor of personal property. If the sewerage was proper, and the taxes assessed to effectuate it were for a corporate purpose, then they must be uniform as to persons and property. The burden must be imposed upon all the property within the limits to be taxed.

4. So, too, that portion of the charter which authorizes the tax to be levied in a particular district in the city is in violation of the constitution. The legislature can not clothe the corporate authorities of the municipality with power to assess and collect taxes from only a part of the municipality, for a corporate purpose. The corporate purpose must extend to the entire city, and in the apportionment of the tax to effectuate the purpose, the principle of equality and uniformity must be observed.

**APPEAL** from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Mr. WILLIAM H. UNDERWOOD and Mr. MARSHALL W. WEIR, for the appellants.

Mr. N. NILES, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellants filed a bill to enjoin the collection of certain taxes assessed against their real estate, and to remove certain judgments as clouds upon their title.

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Opinion of the Court.

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Sections 2 and 3 of Art. 8 of the charter of the city of Belleville authorized the city council to lay off the city into districts for the construction of sewers, and to levy and collect a special tax on the real estate within any district to be drained. (Private Laws of 1867, vol. 1, p. 551.)

Numerous objections have been urged to the decree of the circuit court, dissolving the injunction and dismissing the bill, but we propose to consider only the power of the council, and the constitutionality of the sections cited.

All the proceedings show, not a special assessment, but a tax; and the power of the legislature to enact the sections under consideration, confronts us at the threshold of the argument. In the record the amounts assessed are called taxes, and the act grants power to "levy and collect a special tax on the real estate within the district so drained," to be annually levied and collected as other city taxes.

Sections 2 and 5 of Art. 9 of the constitution of 1848, expressly provide that, all taxes shall be levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, and that all the property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law; that all taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same, and that corporate authorities shall have power to assess and collect taxes for corporate purposes.

The bill alleges, and the answer admits, that the personal property of appellants, and all improvements upon the real estate, were exempt from the taxes sought to be enjoined.

Equality and uniformity of taxation have been repeatedly recognized and enforced by this court. They must be applied, not only to the rate of taxation, and to the district to be taxed, but also to all the property subject to taxation.

The ordinance, in exempting improvements upon the real estate, was a violation of the charter. Fixed and permanent buildings upon land form a part of it, and should be estimated

## Opinion of the Court.

in assessing its value. *Fitch v. Pinckard*, 4 Scam. 40. A palatial residence upon a lot greatly enhances its value; and thus improved, it should bear a heavier burden of taxation than one with an humble and less costly building. The council had no right to make the discrimination, and exclude from taxation valuable and permanent improvements.

It was likewise beyond the constitutional power of the legislature to make the discrimination in favor of personal property. If the sewerage was proper, and the taxes assessed to effectuate it were for a corporate purpose, then they must be uniform as to persons and property. The burden must be imposed upon all the property within the limits to be taxed. Any other rule would utterly destroy the equality and uniformity contemplated by the constitution. With as much propriety and justice, the law might compel one-half of the real estate within the district to sustain the burden of the improvement.

The term "property," in the constitution, includes both real and personal estate, and the authority granted to levy taxes, for corporate purposes, upon one species of property, to the exclusion of another, transcends the limitation imposed upon the power of taxation.

The section of the charter under consideration empowers the city council to levy the taxes necessary for the purposes of drainage, upon real estate. This municipal corporation is the mere creature of the law, and can only exercise such powers as are conferred by the law-making power. The limitation of the power to tax real estate excludes the power to tax personal property, and we must hold the power granted in violation of the constitution. *Trustees v. McConnell*, 12 Ill. 138; *Hunsaker v. Wright*, 30 Ill. 147.

The authority conferred is, that the city council may levy the tax on a particular district in the city. This gives the power to the council to tax only a portion of the property in the city. If the tax is for a corporate purpose, it must be uniform, and co-extensive with the boundaries of the municipality. It must

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Syllabus.

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be a burden upon all the property. It can be assessed and collected for corporate purposes only.

It was held, in *Harward v. St. Clair Drain. Co.* 51 Ill. 130, that sec. 5, Art. 9, was a limitation upon the power of the legislature. It must therefore follow that the legislature can not clothe the corporate authorities of the municipality with power to assess and collect taxes from only a part of the municipality, for a corporate purpose. The corporate purpose must extend to the entire city, and in the apportionment of the tax to effectuate the purpose, the principle of equality and uniformity must be observed. *City of Chicago v. Larned*, 34 Ill. 203.

The decree of the court is reversed and the cause remanded, with directions to make the injunction perpetual, and to grant the relief prayed for.

*Decree reversed.*

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• HENRY GARDNER

v.

HENRY A. WITBORD.

1. COMMON PLEAS COURT OF SPARTA—*writ issued from, how directed.* A writ issued from the court of common pleas of the city of Sparta, in Randolph county, is properly directed "to the city marshal and all sheriffs, coroners and constables of said county."

2. SAME—*territorial jurisdiction of.* The territorial jurisdiction of such court is, by the provisions of the constitution of 1848, relating to inferior local courts, circumscribed by the city limits.

3. SAME—*writ, whether void—service.* Although the mandate of a writ, issued from such court, is to summon the defendant "if he shall be found in your county," etc., yet the service, if shown by the return to have been made in the city of Sparta, is good, otherwise it is defective.

But the writ itself, by reason of such mandate, although the service be defective, is not void and should not be quashed.

10—59TH ILL.

## Syllabus. Statement of the case.

4. *SAME—venue.* In the margin of a writ, issued out of the common pleas court of the city of Sparta, in Randolph county, the proper State and county were named, and the command in the body of the writ was to summon the defendant, "to be and appear before the common pleas court of Sparta, of said county, on," etc., "to be holden," etc., "at the court house in Sparta, in said Randolph county," etc.: *Held*, the venue was well enough laid.

APPEAL from the Common Pleas Court of Sparta; the Hon. WILLIAM P. MURPHY, Judge, presiding.

This was an action of assumpsit, brought on a promissory note given by Witbord to Gardner. The question arises upon the writ, which was as follows:

STATE OF ILLINOIS, } ss.  
Randolph county. }

*The people of the State of Illinois to the city marshal, to all sheriffs, coroners, and constables of said county, greeting:*

We command you to summon Henry A. Witbord, if he shall be found in your county, personally to be and appear before the Common Pleas Court of Sparta, of said county, on the first day of the next term thereof, to be holden at the court house in Sparta, in said Randolph county, on the first Monday of February, 1871, to answer unto Henry Gardner, in a plea of assumpsit, to the damage of said plaintiff, as he says, in the sum of three hundred (\$300) dollars, and have you then and there this writ, with an endorsement thereon in what manner you have executed the same.

Witness Theodore Simpson, Clerk of our said court, and the seal thereof, at his office in Sparta, in said Randolph [SEAL.] county, this 23d day of December, A. D., 1870.

THEODORE SIMPSON, *Clerk.*

[Return of Officer.]

*State of Illinois, Randolph county:*

I have duly served the within named Henry A. Witbord, this 13th day of January, A. D., 1871, as I am herein commanded.

EDWIN R. FOSTER, *City Marshal.*



The defendant filed a motion to quash the writ, assigning the following special causes :

*First.* For that the writ is not directed to the city marshal of the city of Sparta.

*Second.* For that said writ, being original process, is directed beyond the jurisdiction of the court, to-wit : "To the city marshal and all sheriffs, coroners and constables of said county," to-wit : Randolph county.

*Third.* For that said writ commands to summon said Witbord if found in the county.

*Fourth.* Writ is directed and by its terms sent beyond the jurisdictional limits of the court.

*Sixth.* For that there is no venue laid in said writ, that is to say, the venue of said court is not laid in said writ.

The court sustained the motion to quash the writ, and rendered judgment in favor of the defendant. The plaintiff appeals.

Mr. J. BLACKBURN JONES, for the appellant.

Mr. JOHN MICHAN and Mr. R. J. GODDARD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

The error assigned upon this record, is, sustaining a motion to quash the writ.

The writ was properly directed "to the city marshal and all sheriffs, coroners and constables," as the act to establish the court of common pleas in the city of Sparta, in Randolph county, expressly provides that all process shall be so directed. Session Laws of 1869, page 140, sec. 8.

The venue of the court is well enough laid in the writ. The proper State and county are named in the margin according to the ordinary form, and the command in the body of the writ is, to summon the defendant, "to be and appear before the common pleas court of Sparta, of said county, on the first

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Syllabus.

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day of the next term thereof, to be holden at the court house in Sparta, in said Randolph county," etc.

The territorial jurisdiction of this court is limited by the constitution to the city of Sparta. *The People v. Evans*, 18 Ill. 361; *Holmes v. Fihlenburg*, 54 Ill. 203.

Although the mandate of the writ is, "to summon Henry A. Witbord, if he shall be found in your county," etc., the service, if it had been shown by the return to have been made in the city of Sparta, would have been good. It is now defective, as it does not appear by the return to have been so made. But the writ itself was not void, and should not have been quashed.

The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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CHARLES PINKSTAFF *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS, use, etc.

1. ADMINISTRATOR'S BOND—*where a second or additional bond is given—liability thereon.* An administrator, after having given the usual bond required, gave a second or additional bond, not, however, on the application of the sureties in the first bond, under the 79th section of the statute, but to furnish security for his official conduct satisfactory to the probate court. The second bond did not by its terms relate back to the granting of the administration. Its conditions were identical with those of an ordinary administrator's bond, except that, after describing the principal in the bond, as administrator of the "goods and chattels, rights and credits" of the deceased, he is required to make an inventory merely of the "rights and credits" which should come to his hands, leaving out the words "goods and chattels." The effect of this was that when, in a subsequent part of the conditions of the bond, the administrator was required to deliver and pay over to the persons entitled thereto, "all the rest of said goods and chattels," the words "said goods and chattels" should be

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Syllabus. Opinion of the Court.

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referred to all the goods and chattels which had come to the hands of the administrator, and not merely to those coming to his hands after the giving of the bond.

2. If the more specific conditions in the bond would not be sufficient, the general one that he was to "do and perform all other acts which may be at any time required of him by law," would require him to pay over to the guardian whatever might be due the heirs.

3. So, where the administrator had misapplied the funds of the estate before the second bond was given, by appropriating them to his own use, the sureties on such bond would be liable to the guardian of the heirs for such portion of the money as he was entitled to in that capacity; and this, even if the sureties were only liable for breaches occurring after its execution, because the gravamen of the action would be, not the prior misapplication, but the failure to pay over.

4. Nor is it necessary, in such case, that the first bond should be exhausted, before resort could be had to the second. The first bond continued in force, and was as obligatory upon its makers as if the second had never been given; but a creditor, or other person interested in the estate, has his election upon which to sue, if the mal-administration for which suit is brought, would be a breach of both the bonds.

5. JUDGMENT—*in suit on administrator's bond.* In an action upon an administrator's bond, the formal judgment in debt need not be for the full penalty of the bond.

WRIT OF ERROR to the Circuit Court of Crawford county;  
the Hon. H. B. DECIUS, Judge, presiding.

Mr. E. CALLAHAN, for the plaintiffs in error.

Mr. J. G. BOWMAN and Mr. J. S. PRITCHETT, for the defendants in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the guardian of the infant children of Mary E. Hyde, deceased, against the sureties, upon a second or additional bond given by her administrator. The breach in the declaration is, the refusal of the administrator to pay over to the guardian the money belonging to the heirs. A recovery is resisted on the ground, that the assets came into the hands of the administrator, and, as averred in the plea

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and admitted by the demurrer, were appropriated by him to his own use, before the execution of the second bond. This bond was not given on the application of the sureties in the first bond, under the 79th sec. of the statute, and does not by its terms relate back to the granting of the administration. Its conditions are identical with those of an ordinary administrator's bond, except that, after describing the principal in the bond, as administrator of the "goods and chattels, rights and credits" of the deceased, he is required to make an inventory merely of the "rights and credits" which shall come to his hands, leaving out the words "goods and chattels." The effect of this is that when, in a subsequent part of the conditions of the bond, the administrator is required to deliver and pay over to the persons entitled thereto, "all the rest of said goods and chattels," a grammatical construction would require the words "said goods and chattels," to be referred to all the goods and chattels which had come to the hands of the administrator, and not merely to those coming to his hands after the giving of the bond. The omission of these words, though possibly accidental, relieves the bond of all merely verbal difficulties, and is consistent with the undoubted design of the parties. That intention must have been to prevent the removal of the administrator, by giving such additional security as would be satisfactory to the probate court, that he would faithfully, in the future, perform the duties of his office. By the terms of the bond, he was to "do and perform all other acts which may be at any time required of him by law." And if the more specific conditions in the bond would not be sufficient, this general one alone would require him to pay over to the guardian whatever might be due the heirs.

Conceding the sureties upon the bond are liable only for breaches occurring after its execution, the breach in the present case is of that character. Even if the money due the heirs had been, as averred in the plea, appropriated by the administrator to his own use before the bond was given, yet,

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Opinion of the Court.

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for such misapplication of the funds, he would be liable only for nominal damages, if able and willing to pay the heirs whatever might be due them on final settlement. The gravamen of this action is, not that the administrator had confounded the trust funds with his own, and appropriated them to his own use, but that he did not respond to the demands of the guardian. Whether he had, in fact, used the trust funds or not, when this bond was given, they were, in the eye of the law, then in his hands to be administered, and the bond was given as security that they should be so administered. But for this new bond he probably would then have been removed, and the heirs and creditors would have had their recourse upon the first bond. By the additional bond he was kept in office, the securities thereon undertaking that he would duly administer all unadministered assets. The bond can have no other rational construction, and such must have been the intention of the parties. He then stood chargeable with certain assets. For the purposes for which this bond was given they were in his hands. The securities undertook that he would pay them over to the persons entitled to receive them, when duly called upon. This he has not done, and hence the liability of these defendants.

It is also insisted that the first bond should be exhausted, before resort is had to the second. Undoubtedly the first is still in force, and as obligatory upon its makers as if the second had never been given. But a creditor, or other person interested in the estate, has his election upon which to sue, if the mal-administration, for which suit is brought, would be a breach of both the bonds.

It is further urged, that the judgment for damages is for too large a sum. It is insisted that the administrator *de bonis non*, charged himself with certain assets for which the former administrator should have received credit. But it does not appear these assets came from the former administrator, and we can not presume that fact against the finding of the court.

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Syllabus.

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It is further urged, that the penalty of the bond was \$2500, yet the court gave judgment for only \$900 debt, to be discharged by the payment of \$812.48 damages. This court held, in *The People v. Summers*, 16 Ill. 173, that in suits on administrators' bonds, the judgment need not be for the full penalty of the bond; and in *The People v. Randolph*, 24 ib. 325, it was held, that a recovery on an administrator's bond would not, under the peculiar provisions of the statute, bar a second suit. The amount of the formal judgment in debt in this case was, therefore, immaterial, and is no ground for reversal.

*Judgment affirmed.*

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ST. LOUIS VANDALIA AND TERRE HAUTE RAILROAD  
COMPANY

v.

LUDWIG KAULBRUMER.

**TROVER**—*whether it will lie.* In an action against a railroad company, it appeared the plaintiff had hauled out and delivered on the line of defendants' road a certain number of fence posts, for the purpose of selling the same, at a place where fence posts were delivered for and received by the builders of defendants' road; that the posts, without the knowledge or consent of the plaintiff, were loaded on a construction train on defendants' road and taken away and used, by the employees of McKeen, Smith & Co., to fence the defendants' road; that the defendants had made a contract with McKeen, Smith & Co., to construct and fence their road for a stipulated price, and for that purpose had given them the exclusive control over the road until its completion, all the earnings over and above the cost of operating the road, to be paid over by the contractors to the company; that before the institution of the suit the road had been fully completed and turned over to the defendants. The plaintiff had no contract with the defendants in regard to the posts: *Held*, the posts having been placed upon and attached to the lands of the defendants by the contractors, while they were operating the road and without the plaintiff's consent, thus becoming

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Opinion of the Court.

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a part of their realty and thereby being in the possession of the defendants, the plaintiff could maintain an action of trover against the company for the value of the posts.

APPEAL from the Circuit Court of Effingham county ; the Hon. H. B. DECIUS, Judge, presiding.

Mr. JOHN SCHOLFIELD, for the appellants.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action instituted before a justice of the peace in Effingham county, brought by appellee to recover for a number of fence posts, used by appellants in fencing their track. A judgment was recovered against the road, and an appeal prosecuted to the circuit court, where the case was, by consent, submitted to the court without the intervention of a jury, on this agreed statement of facts :

“The plaintiff made and hauled out four hundred and eighty-four fence posts and delivered them on the line of the defendants’ road to sell the same, at a place where fence posts were delivered and received by the builders of defendants’ road. That about the 10th day of May, A. D. 1870, these fence posts were loaded on a construction train on defendants’ road, without plaintiff’s knowledge, and taken away; that they were taken to fence defendants’ road by the employees of McKeen, Smith & Co.; that plaintiff had no contract with the defendants with regard to the posts; that the posts then taken were worth thirty-eight dollars and seventy-two cents; that the defendants made a contract in February, A. D. 1868, with McKeen, Smith & Co., to construct their road, and fence the same from East St. Louis to Terre Haute, for a stipulated price; that by said contract they were to have, and did exercise exclusive control over the defendants’ road until its completion; that during the construction of the road the contractors were to, and did pay over to the defendants all the earnings derived from transportation over operating expenses, being a small sum of money; that they fully completed the

construction of the road and turned it over to the defendants on the first day of July, A. D. 1870."

On these facts the court below found for the plaintiff, and rendered a judgment against defendants for \$38.72 and the costs of suit, from which an appeal is prosecuted to this court, and a reversal is urged upon the ground that the facts fail to sustain the finding of the court.

It is not contested that McKeen, Smith & Co. were contractors for the construction of the railway fences, and for their completion they had the control of the railway for the time being, and whilst thus operating the road, they took and appropriated the posts in controversy, in erecting appellants' fences. And it is equally clear, that appellee's posts were, without his consent, used in constructing the fences. The posts were placed upon and attached to the land of appellants, and now constitute a part of their realty. They have been permanently annexed to it, and appellee could not reclaim his property without committing a trespass. But still he has a right to either recover his property or its worth. He did not lose his title to the posts, simply because McKeen, Smith & Co. committed a trespass in hauling them away from the place where appellee had deposited them.

Appellee could, no doubt, have maintained trespass, or trover, against the contractors after they took the posts, but like any other species of personal property, it could be followed and recovered from any person who had subsequently come into its possession. Appellants have received the posts from the contractors and still hold them, and no reason is perceived why trover will not lie for their recovery. And appellee has the undoubted right to treat his action, brought before the justice of the peace, as such an action, and the facts, as admitted, show a clear right to recover in that form of action. And to permit a recovery, it is by no means necessary to hold appellants liable for the trespasses committed by the contractors, but simply to require them to answer for the value of appellee's property, which they hold. The contractors, as all



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know, could confer no higher or better title to the posts than they possessed, and the facts show they had none.

No question of a demand for the property, before bringing the suit, is made in the agreed statement of the facts. It seems that it was submitted on the agreement, that the case might be determined on its merits. Nor is that objection urged here. We are not inclined, when it seems to have been waived by appellants, to raise so technical an objection. The judgment of the court below must be affirmed.

*Judgment affirmed.*

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THE CITY OF EAST ST. LOUIS

v.

WILLIAM A. WITTS.

1. CONSTITUTIONAL LAW—*validity of the act of 1867, "to establish a police force for the city of East St. Louis."* The decisions in the cases of *Lovington v. Wider et al.* 53 Ill. 302, and *The People ex rel. Wider et al. v. Canty*, 55 Ill. 83, holding that the police commissioners of the city of East St. Louis, appointed under the act of 1867, had no power to create a debt against the city, re-affirmed.

2. ADMISSION OF EVIDENCE—*without objection—whether conclusive as to its legal effect.* In an action of debt against the city of East St. Louis, upon certain certificates of indebtedness, termed scrip, issued by such police commissioners, it was *held*, while the admission of such certificates as evidence, without objection, precluded the defendant from raising any question as to the execution of the certificates, or their genuineness, yet it did not preclude it from questioning their legal effect as a basis of recovery, either upon the argument of the case before the court, or upon a motion for a new trial.

WRIT OF ERROR to the Circuit Court of St. Clair county ;  
the Hon. JOSEPH GILLESPIE, Judge, presiding.

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Opinion of the Court.

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Mr. WILLIAM H. UNDERWOOD and Mr. L. H. HITE, for the plaintiff in error.

Messrs. G. & G. A. KOERNER, for the defendant in error.

Per CURIAM: This was an action of debt, brought in the St. Clair circuit court, by the defendant in error against the city of East St. Louis. The only evidence offered consisted of certain certificates of indebtedness, termed scrip, issued by the police commissioners. We have already decided these commissioners have no power to create a debt against the city. *Lovington v. Wider*, 53 Ill. 302; *The People ex rel. Wider v. Canty*, 55 Ill. 33. We are asked to reconsider these decisions. We entertain no doubt as to their correctness. The scrip being the only evidence, the court, which tried the case without a jury, should have found for the defendant. It is proper to remark, however, that the opinions of this court in the above cases had not been delivered when the case at bar was tried.

It is urged by counsel for defendant in error, that the certificates were admitted without objection. This precluded the defendant from afterwards raising any question as to the execution of the certificates, or their genuineness, but not from questioning their legal effect as a basis of recovery, either upon the argument of the case before the court, or upon a motion for a new trial. Here, a motion for a new trial was made upon that ground, and overruled, and exception was duly taken. This brings the question before us.

The judgment must be reversed.

*Judgment reversed.*

## THE PEOPLE OF THE STATE OF ILLINOIS

v.

JAMES CHRISTERSON *et al.*

1. STATE'S ATTORNEYS—*of their right to receive payment of fines, etc., and receipt therefor—construction of act of 1865.* Within the power conferred on State's attorneys by the act of 1865, which makes it their duty to enforce the "collection of all fines, forfeitures and penalties" imposed or incurred in the courts of record in their several counties, and pay the same over to the school superintendents of the proper counties, is included the right to receive such fines, etc., and give receipts therefor, that shall operate as a full discharge to the party paying the same; and also the right to receive the amount of any judgment that may have been rendered for any such fine, forfeiture and penalty, and execute acquittance therefor.

2. Where payment of a judgment, upon a forfeited recognizance, was made to the county treasurer of the county in which the same was rendered, by the direction and consent of the State's attorney in and for the judicial circuit in which such county was situated, it was *held*, such payment amounted to a satisfaction of the judgment—was payment to the attorney himself. The State's attorney had the right to order, or agree, that the party should pay the money to any solvent bank, or responsible party, for his use.

WRIT OF ERROR to the Circuit Court of Marion county.

Mr. J. B. KAGY, for the plaintiffs in error.

Mr. AMOS WATTS, for the defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a *scire facias* filed in the Marion circuit court, by the plaintiffs in error, against the defendants in error, to revive a judgment upon a forfeited recognizance.

The defendants filed a special plea, alleging full payment of the judgment described in the *scire facias*. It is averred in the plea, that the defendants, by the direction and consent of J. Perry Johnson, who was then State's attorney in and for the judicial circuit in which Marion county is situated, and who was then acting in behalf of the plaintiffs, paid the full amount

of said judgment to Smith Lorimer, county treasurer of said county, and all the costs to the proper officers entitled to receive the same.

The court overruled the demurrer interposed to this plea, and the plaintiffs electing to stand by their demurrer, judgment was rendered for the defendants.

The decision of the court, overruling the demurrer, is now assigned for error.

By the act of 1865, (Session Laws 1865, p. 124, sec. 28,) it is made the duty of State's attorneys of the several judicial circuits to enforce the collection of all fines, forfeitures and penalties, imposed or incurred in the courts of record, in their several counties, and pay the same over to school superintendents of the proper counties. The power thus conferred, to enforce the "collection of all fines, forfeitures and penalties," necessarily includes the right to receive and give receipts therefor, that shall operate as a full discharge to the party paying the same. It will also include the right to receive the amount of any judgment that may have been rendered for any such fine, forfeiture and penalty, and to execute an acquittance therefor.

In this instance, the money was not paid directly to the State's attorney, but it was paid by his order and direction to the county treasurer, and this must be held to be payment to the attorney himself. No reason is perceived why the State's attorney could not order, or agree, that the party should pay the money to any solvent bank or any responsible party, for his use.

This judgment and costs have been once fully paid, under the direction of the plaintiffs' attorney and agent, and it would be unjust, now, to allow them to have further execution of the judgment.

The demurrer was properly overruled, and the judgment is affirmed.

*Judgment affirmed.*

DEDERICK H. MORHINNERS *et al.*

v.

THE COUNTY COURT OF CLINTON COUNTY, use, etc.

**NEW TRIAL**—*verdict against the evidence.* In this case the judgment is reversed on the ground that, as appears from the record, there was no evidence to support the verdict of the jury.

**WRIT OF ERROR** to the Circuit Court of Clinton county ;  
the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action on the official bond of a constable against the constable and his sureties. A trial by jury resulted in a verdict and judgment for the plaintiffs. To reverse the judgment, the defendants bring the record to this court.

Mr. W. H. GRAY, for the plaintiffs in error.

Mr. G. VAN HOOREBEKE, for the defendants in error.

**PER CURIAM:** This seems to have been an action on the official bond of a constable against the constable and his sureties; but it does not appear from the bill of exceptions that the bond was offered in evidence; and, therefore, as appears from the record, the court below erred in not granting a new trial, on the ground that there was no evidence to support the finding.

For this reason the judgment is reversed and the cause remanded.

*Judgment reversed.*

## Syllabus.

## GEORGE W. THOMAS

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. *LOTTERY—what constitutes.* In a prosecution for the alleged sale of a lottery ticket, it appeared the ticket was as follows:

## “CHICAGO INDUSTRIAL COLLEGE AND HOME FESTIVAL.

“This ticket is a receipt for \$5, in payment for and delivery of a copy of a steel plate engraving, and admission to our concerts and lectures, for which it is sold.

“By order of the officers,

THOMAS & Co., General Agents.”

Besides the ticket, a steel plate engraving was delivered to the purchaser, and also a bill, entitled, “Grand National Festival, to erect in the city of Chicago an Industrial College and Home for Unfortunate Females,” and it was proposed in the bill to give a series of musical receptions, and a course of lectures, in Chicago, at the close of which, and after the sale of 200,000 copies of steel plate engravings, to distribute to the purchasers of engravings, “in a just and legal manner,” \$200,000, in presents, amounting in number to 3012. Twenty-eight hundred of this number were to be the newspapers of Chicago, at a price from \$2 to \$12 each. The remaining 212 were estimated at \$35,000 to \$50,000. It was *held*, this was “a scheme for the distribution of prizes by chance,” and constituted a lottery, within the meaning of the statute.

2. The fact that no plan of distribution had been determined upon at the time of the sale of the ticket, would not relieve the scheme of its character as a lottery, when it was apparent that some of the purchasers of tickets would fail to receive a prize. The promise that the distribution should be in “a just and legal manner,” was evasive.

3. And even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth the price paid for the ticket, the scheme would still be a lottery.

4. *EVIDENCE in such case—to prove the intent.* It was proper, in such case, to admit in evidence, on behalf of the prosecution, not only the ticket sold, but the bill or advertisement delivered to the purchaser, which explained the purposes and character of the scheme, and also other tickets and bills or advertisements of similar kind, sold and delivered by the accused to other parties, as tending to prove the intent with which the ticket was sold.

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Syllabus. Statement of the case. Opinion of the Court.

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5. If the intent can not be implied from the facts and circumstances which, with the intent, constitute the crime, then other acts of the party, from which it can be implied, may be proved. Whatever will prove the intent, is admissible, either to show *scienter*, or guilty knowledge.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

George W. Thomas was indicted, in the court below, for selling a lottery ticket to John McAuley. A trial resulted in a finding of guilty, and the assessment of a fine of \$100, and costs.

The defendant thereupon sued out this writ of error.

Messrs. E. & A. VAN BUREN, for the plaintiff in error.

Mr. CHARLES H. REED, State's attorney, for the people.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

The charge against plaintiff in error is, the unlawful sale of a lottery ticket.

The statute creating the offense is as follows : " If any person shall vend, sell, or otherwise dispose of, any lottery ticket in this State, he, she, or they, shall be liable to indictment, and on conviction thereof, fined in a sum not less than \$100 nor more than \$500, and shall stand convicted until the fine and costs are paid."

The following is a copy of the ticket sold :

" CHICAGO INDUSTRIAL COLLEGE AND HOME FESTIVAL.

" This ticket is a receipt for Five Dollars, in payment for and delivery of a Copy of a Steel Plate Engraving, and admission to our Concerts and Lectures, for which it is sold.

" By order of the Officers,

" THOMAS & Co. General Agents."

Besides the ticket, a steel plate engraving was delivered.

At the time of the sale, a bill was given to the purchaser, entitled, " Grand National Festival, to erect in the city of Chicago  
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an Industrial College and Home for Unfortunate Females," and it was proposed to give a series of superb musical receptions, and a course of lectures, in Chicago, during the months of April, May, June and July, 1871, and at the close thereof, and after the sale of 200,000 copies of steel plate engravings, to distribute, as presents, to the purchasers of engravings, "in a just and legal manner," \$200,000 in presents, amounting in number to 3012. Twenty-eight hundred of this number are the newspapers of Chicago, at a price from \$2 to \$12 each. The remaining 212 are estimated at \$35,000 to \$50,000.

The people also introduced, in evidence, other tickets and bills or advertisements of a similar kind, sold and delivered by plaintiff in error to other parties.

It is contended that the court erred in the admission of any of the papers, except the ticket sold to the party mentioned in the indictment.

Intent is the gist of an offense. If it can not be implied from the facts and circumstances which, with the intent, constitute the crime, then other acts of the party, from which it can be implied, may be proved. Whatever will prove the intent is admissible, either to show *scienter*, or guilty knowledge. It has repeatedly been held, that, in indictments for knowingly uttering a forged document, or counterfeit bank notes, proof of the possession, or the prior or subsequent utterance of other false documents or notes, though of a different description, should be admitted, to determine the question of intent. An independent offense is also receivable to show intent. Wharton Crim. Law, 292-301; 1 Greenlf. Ev. sec. 53.

This court held, in *Dunn v. The People*, 40 Ill. 465, that it was proper for the prosecution to read to the jury the contents of other envelopes, beside the one sold, for the purpose of showing the true character of the transaction.

The delivery of the bill, at the time the ticket was sold, together with its contents, tend to explain the object of the sale, and the manner in which the scheme was to be carried out.



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These papers were admissible to show the true intent of the party charged.

The principal objection urged to the judgment is, that the ticket in question is not a lottery ticket; that the sale was not within the purview of the statute, and that there is no chance in the scheme.

This court, in *Dunn v. The People*, *supra*, has accepted the definition of the lexicographers, that a lottery is "a scheme for the distribution of prizes by chance."

The ticket alone does not constitute a lottery, for we are not informed by it that there would be any distribution of prizes. When, however, we consider it in connection with the advertisement, we ascertain that there will be a distribution at the close of the concerts and after the sale of the engravings.

The advertisement contains this language: "There will be distributed, as presents, to the purchasers of engravings, in a just and legal manner, \$200,000 in presents." The term, "present," though literally it means a gift, yet, in the relation, and in the sense in which it was used, evidently meant a prize. It was offered as the reward of contest, to the purchasers. It was something to be won. One ticket and engraving were sold for \$5, 100 engravings and tickets for \$125, and 1000 for \$4250. Inducements were thus offered to struggle for the prizes.

Here, then, was a scheme for the distribution of prizes. Was the distribution certain and fixed, or was it to be by chance?

It is urged, in defense of this scheme, that no plan of distribution had been determined upon; that the purchasers were to receive certain articles in a just and legal manner, and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals.

The distribution was to be in a just and legal manner. It should, then, be in an honest, upright and equitable mode. There should be perfect fairness and equality. This plan

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would be utterly violated, if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a "just and legal manner," unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of money paid.

It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs, we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjecture. We have no right to harbor wild imaginations, to change a reasonable and probable result.

From the facts developed, we assume that it is not only probable, beyond a reasonable doubt, but almost an absolute certainty, that some of the numerous purchasers would have received blanks. We think this was intended. . Even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase. Each person who invested \$5 became entitled to a chance for \$50,000 in glittering gold, or \$25,000 in greenbacks, or a splendid residence in Chicago, or in Brooklyn, N. Y. The purchasers were thus incited to rivalry. Gold, which, in the estimation of some, opens all the avenues of pleasure, was the lure to incite the credulous and unsuspecting into this scheme.

Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gaming table?

Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them.

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This influence may not be so direct, and the immediate consequences so disastrous, as in some kinds of gambling, which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number, and a better class. The evil may spread more widely, and infect more deeply.

It is said that the plan was undetermined, and that the wisdom of the "advisory committee" would have devised one, just and equal. So chance is always undetermined. It neither forms nor designs. Intention is never attributed to it; its events are uncertain.

The promise of the hand bill, that the distribution shall be in a just and legal manner, is evasive. We are not bound to determine the intention from the language alone, but from all the facts, and the reasonable deductions from facts.

The scheme itself is deceptive. If the engravings are worth \$1,000,000, and the presents \$200,000, then \$1,200,000, together with concerts and lectures, are given for \$1,000,000. This benevolence is too exalted and disinterested.

Counsel argued that the object to be obtained is high and holy. To redeem an unfortunate class from ruin, degradation, and a fate worse than death, is a noble and christian work. The laborers in such a cause deserve universal sympathy.

The law does not manifest sympathy, but dispenses even-handed justice. Enthroned in its majesty, it smiles and frowns upon all alike. Submission to its authority is incumbent upon all.

The judgment of the court below is affirmed.

*Judgment affirmed.*

## THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

THOMAS McCULLOUGH.

1. **POSSESSION**—*as notice to subsequent purchasers.* Where a vendor of land continues to remain in possession of the premises, such possession will constitute constructive notice to a subsequent purchaser from his vendee, of the rights and equities of the first vendor in the land, and the second purchaser will hold subject to those rights and equities.

2. **ESCROW**—*where a deed intended as an escrow is put upon record without the knowledge or consent of the grantor.* Where a vendor of land executed a deed and left it in the hands of the officer taking the acknowledgment, to be by him delivered to a third person who was to hold it as an *escrow* until the purchase money should be paid, but, without ever having come to the hands of him who was to hold it as an *escrow*, the deed was placed upon record, without the knowledge or consent of the grantor, it was *held*, the agreement between the parties that the deed was not to be delivered or recorded until the purchase money should be paid, continued until changed by the consent of the vendor, and a subsequent purchaser from his vendee, with notice, would hold subject to the rights and equities of the first vendor, arising from such agreement.

3. **SAME**—*what would amount to a delivery of the deed.* In case of a sale of the land by the first vendee, and the acceptance by his vendor of the notes of the second purchaser for the unpaid purchase money due the former, together with a mortgage from the latter on the same premises, to secure such notes, which were taken in lieu of the notes given by the first purchaser, a recognition by the original vendor, of title in the mortgagor, would be implied thereby, and his assent to the delivery of his deed to his vendee.

4. But such a transaction would not, of itself, import that the assent of the original vendor, to the delivery of the deed, was given at any time prior to the acceptance of the notes and mortgage of the second purchaser, nor would it necessarily imply a ratification of the obtaining possession of the deed and putting it on record, contrary to the agreement in respect thereto. The legal intentment could be no more than that the first vendor consented to a change in the form of his security, and assented to the delivery of the deed to his vendee, on the condition that he should, at the same time, receive back a mortgage of the lands to secure the payment of what remained due to him.

5. **SAME**—*and herein, of an intervening incumbrance.* The assent by the original vendor to the delivery of the deed to his vendee, and his acceptance of the mortgage from the second purchaser, being simultaneous acts,

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and the title resting but for an instant in either vendee, a deed of trust executed by the first vendee to a third person prior to that transaction, would not attach as a lien upon the land, to the prejudice of the subsequent mortgage, merely by reason of the title remaining in the maker of the deed of trust or the subsequent mortgagor for the brief interval necessary to the consummation of the transaction, as would have been the case if it had so remained for any time.

6. VENDOR AND PURCHASER—*subsequent incumbrancer*. Where a vendor of land has received a part of the purchase money, and seeks, by foreclosure of mortgage, to compel the payment of the residue, he is entitled to retain what he has received, and take a decree for the unpaid balance. In such case, it is error to decree a return by the vendor, of the portion of the purchase money already paid.

7. And in case the vendee has given a deed of trust on the premises, to a third person, who became the purchaser at a sale thereunder, had prior to the foreclosure in favor of the original vendor, all the interest of him who made the deed of trust will pass to such purchaser, so that, if there be an overplus arising from the sale under the decree of foreclosure, it should be paid over to the purchaser under the deed of trust, instead of the original vendee.

APPEAL from the Circuit Court of Jefferson county.

Messrs. GREEN & GILBERT, for the appellants.

Mr. W. STOKER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

In October, 1857, an agreement was entered into between Thomas McCullough and Aaron K. Corey, whereby McCullough was to sell to Corey certain tracts of land in Jefferson county, for the sum of \$3225—\$125 of it to be paid within a certain time, which was paid, the residue to be paid in instalments. A warranty deed of the lands was to be made to Corey and placed in the hands of one McCord, to be held as an escrow until the last payment of the purchase money was made, and until which time the deed was not to be recorded. November 9, 1857, McCullough signed, sealed, and acknowledged the deed before one Stickney, a justice of the peace, since deceased, who was to hand it to McCord. The latter

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never received possession of the deed, and in some unexplained manner it was filed for record on the 11th of November, 1857, and recorded in the recorder's office of Jefferson county.

On the 26th day of April, 1858, Corey and his wife executed to William H. Howell a trust deed of the lands, to secure the payment to the Illinois Central Railroad Company of an indebtedness in its favor against Corey, which deed was filed for record the 28th of said month, and under which the lands were subsequently sold by Howell, and bought in by the railroad company for the sum of \$2500

June 7, 1858, Corey sold the lands to Oxley & Taylor, for \$5125, and Corey and wife executed to them a warranty deed of the lands, which was filed for record July 15, 1858; for \$3125 of which purchase money, Oxley & Taylor executed their notes to McCullough, secured by their mortgage on the lands, which McCullough accepted in the stead of the notes Corey had executed to him, for the unpaid part of the purchase money due from Corey, and surrendered up to Corey his notes.

McCullough remained in the sole possession of the lands from the date of the deed to Corey and before, up to the filing of the bill.

On the 25th day of February, 1859, McCullough filed his bill in equity, praying that the lands be sold, to pay the residue of the purchase money due him, or that the mortgage by Oxley & Taylor, to McCullough, be foreclosed, and the premises sold to satisfy the notes given by Oxley & Taylor to McCullough, and that the trust deed given to Howell be postponed to complainant's claim for the purchase money, or that said deed of trust be cancelled.

The court below decreed a foreclosure of the Oxley & Taylor mortgage, postponed the rights of the railroad company to those of the complainant under said mortgage, found the sum due to the complainant, and ordered the lands, or so much thereof as might be necessary to satisfy said sum, to be sold,

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and ordered the complainant to pay to Corey the sum of \$125, paid by Corey on the lands, with interest.

The Illinois Central Railroad Company, one of the defendants, appeal from the decree.

The specific errors assigned are, that the court erred in postponing the trust deed to Howell from Corey, to the mortgage to McCullough from Oxley & Taylor, and in ordering \$125 and interest to be paid to Corey instead of to the Illinois Central Railroad Company.

At the time of the execution of the deed of trust to Howell, in trust for the railroad company, McCullough was in possession of the lands. That possession was constructive notice to Howell and the company, of McCullough's rights and equities in the lands, and they took the deed of trust subject to those rights and equities.

The proof is undisputed, that the deed from McCullough to Corey, was to be placed in the hands of McCord, to be held by him as an escrow, until full payment of the purchase money should be made, and, until then, the deed was not to be recorded.

So far as appears, the obtaining possession of the deed by Corey and the recording of it, were without the consent or knowledge of McCullough.

The agreement made between the parties, that the deed was to be placed in the hands of a third person, and not be delivered until the residue of the purchase money should be paid, continued until changed.

There is no evidence of any express change of the agreement, and none of any implied change, further than may be derived from the appearance of the deed upon the record, and the transaction of taking the Oxley & Taylor notes and mortgage.

The first circumstance, of itself, is insufficient, taken in connection with the other evidence in the case, to warrant the inference of any change on the part of McCullough, in the terms upon which the deed was to be delivered. But the transaction of taking the notes of Oxley & Taylor, and their

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mortgage of the lands to secure their payment, in lieu of the notes of Corey, and surrendering up to the latter his notes for the unpaid part of the purchase money, must be held to amount to an implied recognition of title in Oxley & Taylor, and assent to the delivery to Corey of his deed, as the title of Oxley & Taylor must have come from Corey, and he could have no valid title without the delivery to him of McCullough's deed. But this naked transaction does not, of itself, import that such assent was given at the time Corey actually obtained possession of the deed, or filed the same for record, or executed the trust deed to Howell, or at any time prior to that transaction itself; nor does it necessarily imply a ratification of the obtaining possession of the deed and putting the same on record by Corey—there is no evidence that McCullough had actual knowledge of that fact. It is quite unlikely that he would knowingly give up a first lien which he had upon the lands, and take a second mortgage, subordinate to the deed of trust of the railroad company, to secure their large claim. The legal intendment can be no more than that McCullough consented to a change in the form of his security, and assented to the delivery of the deed to Corey, on the condition that he should at the same time receive back a mortgage of the lands, to secure the payment of what remained due to him.

Until the assent of McCullough was given to the delivery of the deed to Corey, the title did not pass to the latter.

The deed from Corey to Oxley & Taylor and their notes and mortgage to McCullough bear the same date, and there being no evidence of any prior consent to the delivery of the deed to Corey, and the legal import of that transaction of itself being no more than that such assent was given at that time, it follows, that at the same time that McCullough parted with his title to the lands, he received back a mortgage of them from Oxley & Taylor, to secure the payment of the remainder of his purchase money. These being simultaneous acts, and the title resting but for an instant in Corey, or Oxley & Taylor, adverse rights which otherwise, if it had so remained



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for a length of time, would have attached upon the lands in their hands, did not so attach. As no right of dower, or judgment, or attachment lien, would, in such case, attach upon the lands as against the mortgage, *Curtis v. Root*, 20 Ill. 53, 1 Wash. Real Prop. 205, *Hazleton et al. v. Lesure*, 9 Allen, 24, for the same reason the mortgage should be unaffected by the prior deed of trust, which had been executed by Corey to Howell.

The deed of trust to Howell for the benefit of the railroad company having been executed previously, and McCullough having appeared at the time of the sale under the deed of trust and forbidden the same, it does not appear that the company could have been misled, to its injury, by the transaction with Oxley & Taylor.

It was erroneous to order the payment by McCullough to Corey of \$125, which Corey had paid on the land.

All the interest of the latter in the lands had become vested in the Illinois Central Railroad Company, by the sale under the deed of trust, and Corey was entitled to nothing further in respect to them. McCullough was entitled to retain what he had received of the purchase money, and to have the lands sold for payment of the residue; and any overplus that might arise from the proceeds of the sale, should be paid to the railroad company, as having succeeded to all the interest of Corey in the lands.

It is objected that there was no express provision to that effect in the decree, but as such would have been the legal result, the decree should not be held erroneous because of the omission of that provision, although the decree might very properly have contained such a direction.

An account should have been taken of the rents and profits of the lands, from the time of the making of the notes and mortgage of Oxley & Taylor to McCullough, and he should have been charged with the same, after the deduction of all sums paid for taxes and necessary repairs of the premises.

The decree of the court below must be reversed and the cause remanded, for further proceedings in conformity with this opinion.

*Decree reversed.*

PHILIP M. GUNDLACH *et al.*

v.

GEORGE FISCHER *et al.*

**AGENCY—duration of—construction of a particular contract.** A entered into a written agreement with B, by which the former was constituted the agent of the latter for the sale of certain machines. The only provision in regard to the duration of the agency was as follows: Said B, in consideration of the faithful performance, by the said A, of the obligations by him hereinafter assumed, agrees to furnish the said A such number of machines as the said A may be able to sell, as his agent, prior to October 1st, 1867: *Held*, by a reasonable construction of the agreement, the agency continued only until the 1st of October, 1867, and the sureties on a bond, executed by A, to secure the faithful performance of his duties as such agent, conditioned that he would justly and fairly account for and pay over all moneys, notes, etc., received by him for such machines as might come to his hands as such agent, were bound only for a failure on the part of A to account for machines received by him prior to that date.

**APPEAL** from the Circuit Court of Clinton county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action of debt brought by Philip M. Gundlach and Jacob Esler, against George Fischer, Alexander H. Johnson, Thomas S. Pope, George Tribble, Philip Meter, Martin Fischer, and Nicholas Muhlhauser. It appeared the defendant George Fischer had entered into an agreement in writing, by the terms of which he was to act as agent for the plaintiffs in the sale of certain machines, and the other defendants were his sureties in a bond, given to secure the faithful performance of his duties as such agent. This suit was brought to recover for an alleged failure, on the part of Fischer, to account for and pay over to the plaintiffs certain moneys received by him from the sale of machines, as required by the terms of the agreement. The defendants, Johnson, Pope, Meter, and Muhlhauser, were duly served with summons, and to the declaration Johnson and Pope filed a plea of *nil debet*, to which the plaintiffs added a *similiter*. Meter and Muhlhauser were

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Statement of the case.

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defaulted. Upon a trial by jury a verdict was rendered in favor of the defendants, Johnson and Pope, for costs. Motion for new trial overruled, and jury empaneled to assess damages against Meter and Muhlhauser, defendants in default. Verdict for defendants, and final judgment entered against the plaintiffs for costs of suit, from which they prosecute this appeal.

The following is the article of agreement and bond sued on :

ARTICLE OF AGREEMENT, made and entered into, by and between Gundlach & Esler, of Belleville, St. Clair county, and State of Illinois, and George Fischer, of Trenton, county of Clinton, State of Illinois, in manner and form following, to wit :

The said George Fischer agrees to act as agent for said Gundlach & Esler, for the sale of the Buckeye reaper and mower, and horse hay rakes, and Gundlach's patent grain drill, manufactured by Gundlach & Esler, Belleville, Illinois.

The said agency shall extend over and in the vicinity of Trenton, county of Clinton, State of Illinois, in conformity with the terms and stipulations hereinafter expressed ; and the said Gundlach & Esler in consideration of the faithful performance by the said G. Fischer of the obligations by him hereinafter assumed, agree to furnish the said G. Fischer such number of machines as the said G. Fischer may be able to sell as their agent, prior to October 1st, 1867 ; the said Gundlach & Esler reserving to themselves the right, in case they shall not be able to fill his orders, to restrict him to such number of machines as they may be able to supply.

The said G. Fischer further agrees, in acting as such agent :

*First.* To sell no other machines or rakes but such as are furnished by Gundlach & Esler ; and in making sales, to be governed by the instructions hereto annexed, and such as may be given by Gundlach & Esler from time to time, either in writing or print, and made part of this contract ; and in no case to sell a machine, or any part thereof, to any person or persons not known by him to be perfectly good and responsible.

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Statement of the case.

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*Second.* To receive and take good care of all machines sent to him as such agent; to have them properly stored; to pay all freight and charges thereon; to do any and all business connected with the same, and putting them in successful operation. And should any machines remain unsold at the end of the season, to hold the same subject to the order of Gundlach & Esler, and deliver the same in as good order as when received, when required, to them or their authorized agent, free from any and all charges whatsoever, except for money advanced for freight.

*Third.* To attend to selling said machines and collecting and remitting all moneys to Gundlach & Esler promptly and at the time of each sale.

*Fourth.* To attend to collecting of, or to the obtaining of further security on or to the renewal of such notes as are not paid promptly at maturity. For performing the services herein enumerated the said Gundlach & Esler agree to pay the said Fischer ten dollars on each reaper sold, two dollars on each rake, and eight dollars for each drill, all sold and settled for as above, the same to be payable at the time and in the same proportion as the payments are made on the machines sold; the foregoing sum to include the compensation for receiving, storing, delivering, selling, collecting, remitting and putting the machines in practical operation.

In testimony whereof the parties hereunto set their hands and seals this 3d day of May, 1867.

GUNDLACH & ESLER. [L. S.]

GEORGE FISCHER. [L. S.]

*Know all men by these presents,* That we, the undersigned, and George Fischer, are held and firmly bound unto Gundlach & Esler, of Belleville, county of St. Clair, State of Illinois, in the full and just sum of fifteen hundred dollars (\$1500) in lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, and each and every of our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our hands and seals this

third day of May, A. D. eighteen hundred and sixty-seven, (1867).

The conditions of this obligation are such, that if the above said George Fischer, who has taken the agency for the sale of the above named machines of the said Gundlach & Esler, for and within the said vicinity, and that he will justly and fairly account for, and properly discharge his duties thereof, and will pay over all moneys and notes for such machines that may come to his hands as such agent for Gundlach & Esler, then this obligation to be void; else to remain in full force and virtue.

Signed: GEORGE FISCHER. [L. s.]  
A. W. JOHNSON. [L. s.]  
T. S. POPE. [L. s.]  
GEORGE TRIBLE. [L. s.]  
PH. METER. [L. s.]  
MARTIN FISCHER. [L. s.]  
N. MUHLHAUSER. [L. s.]

Signed in the presence of ALFRED GUYOT. [L. s.]

Mr. WILLIAM WINKELMAN, for the appellants.

Mr. G. VAN HOOREBEKE, for the appellees.

Per CURIAM: A fair and reasonable construction of the agreement makes Fischer the agent of Gundlach & Esler, for the sale of machines, until the first of October, 1867. And the appellees, by their obligation, undertook for the faithful discharge of all of Fischer's duties as such agent, and that he should account for and pay all moneys, notes, etc., to Gundlach & Esler, for property and for machinery received prior to that date. It appears, from the evidence, that he received machinery prior to the first day of October, 1867, amounting to \$2023.92. For his faithful account of that sum his sureties are liable, but they are not for machines or property received after that date. The agreement only contemplated, that he should act as agent up to that time, and, hence, the

## Syllabus.

sureties only bound themselves that he should account for machinery received before that date.

The evidence, however, fails to show that Fischer has accounted for all the money and notes received on the sale of the machinery received before the first of October, 1867. Even by Fischer's evidence, it appears that there is some amount still due Gundlach & Esler, for machinery received within the period for which the sureties were bound, and for whatever sum that may be so due they are liable, and the jury should have found that amount, by their verdict. Fischer does not pretend that he had paid the full amount received for the sale of machinery so furnished him, and appellants' witnesses make the amount over two hundred dollars, after deducting the note sent him for collection after the first of October, and all payments. But allowing him a credit of all he claims, still he would owe them, for which his sureties would be liable, at least \$87 and interest. The evidence, as given in this transcript, shows at least that amount. We are clearly of opinion, that the jury misunderstood the evidence and erred in the finding of the verdict, and the court below should have granted a new trial. The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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SIMON COTTOM

v.

SAMUEL HOLLIDAY.

1. *EVIDENCE—declarations of a party—whether admissible in his favor.* Declarations made by one of two contesting parties, out of the presence of the other, are inadmissible as evidence in his favor.

2. *AGENT—of his duty to his principal, and the rights of the latter in respect to the agency.* An agent must not put himself, during the continuance of his agency, in a position adverse to that of his principal. To the latter belongs the exercise of all the skill, ability and industry of the agent.

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Syllabus. Statement of the case.

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3. If a party employ an agent to make a purchase of land, he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price which the agent pays. The agent can not avail himself of any advantage his position may give, to speculate off his principal. All the profits or advantages gained in the transaction belong to the principal. An agent is not permitted, without the assent of his principal, to acquire an interest in the subject matter of the agency, adverse to that of his principal.

4. If an agent make any profits in the case of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal.

5. *SAME—liability of, when acting as agent for both buyer and seller, and of the rights of the buyer in such case.* While a person can not properly be the agent of both parties, buyer and seller, yet if he accepts the position of agent for the buyer, without disclosing the fact that he is agent for the seller, he can not afterwards repudiate such position to shield himself from liability to the buyer, on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer, he must be held to a strict performance of the duties, and to all the liabilities the relation imposes.

6. Though the buyer may, in a proper case, repudiate the acts of the agent, upon the ground that he was the agent of the seller, and did not disclose the fact.

7. INSTRUCTIONS should not be based on suppositions, in support of which there is no evidence.

8. CREDIBILITY OF WITNESSES—*jury to determine.* Where the testimony of two witnesses is in conflict, it is for the jury, from the evidence as given, together with the manner of the parties when they testify, and from surrounding circumstances, to determine which is entitled to credit. And they should be so instructed when necessary.

WRIT OF ERROR to the Circuit Court of Perry county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

This was an action brought by Cottom against Holliday, in which the plaintiff seeks to recover of the defendant, money he claims the latter wrongfully received of him for the purchase money on a tract of land bought by the defendant, as agent of the plaintiff, from one Ritchie, in excess of the actual purchase price. The questions arising on the record are presented in the opinion of the court.

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Opinion of the Court.

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Mr. EDWARD V. PIERCE, and Mr. R. M. DAVIS, for the plaintiff in error.

Mr. GEORGE W. WALL, and Messrs. MURPHY & BOYD, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action on the case on promises, brought by plaintiff in error in the Perry circuit court, against defendant in error. The declaration contained the common counts, to which the plea of the general issue was filed. A trial was had by a jury, resulting in a verdict in favor of defendant. The record is brought to this court, and various errors are assigned.

It is urged, that the court below erred in admitting evidence of conversations between defendant and Ritchie, when plaintiff was not present. Such evidence, under the long established rules, is inadmissible. No known rule will sanction such evidence. It is calculated to prejudice the rights of parties by enabling either to manufacture testimony against his opponent, of which he knows nothing, and could have no means of resisting. He should not be bound by the declarations of other persons, unless he was present and assented to their truth. The court erred in not excluding this evidence from the jury.

It is next insisted, that the court below erred in refusing to give plaintiff's second instruction, which is this :

"The court further instructs the jury, for the plaintiff, that a party can not take upon himself diverse interests; and that when Holliday, the defendant, received and accepted the power of attorney from the plaintiff Cottom, that he became, to all intents and purposes, the agent of Cottom, and that whatsoever transactions he had with Ritchie after the date of that instrument, in reference to the same transaction, he (Holliday) was acting in that capacity, and as such, must account to his



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Opinion of the Court.

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- principal, Cottom; for whatever funds is left in his hands after Ritchie is paid, belongs to plaintiff."

It is the settled law, that an agent must not put himself, during the continuance of his agency, in a position which is adverse to that of his principal; for the principal bargains for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exercise of all this in his own favor. 1 Pars. on Cont. 74. If plaintiff employed defendant as his agent to make the purchase of this land, then he became entitled to all of his skill, ability and industry, in making the purchase on the best terms that could be had, and plaintiff is entitled to have the property at the price at which defendant purchased of Ritchie. The duties and obligations of an agent are such, that he can not avail himself of any advantage his position may give him, to speculate off his principal. All the profits or advantages gained in the transaction, belong to the principal. The law will not permit the agent, without the assent of his principal, to acquire an interest in the subject matter of the agency, adverse to that of his principal. He must act solely for the interest of his principal while executing the trust. The law will not permit him to be tempted to abuse the confidence reposed in him by his principal. It is a trust voluntarily assumed, and it must be executed in the utmost good faith. This is but the dictate of justice, and common fairness requires its faithful observance. In view of these principles, it was manifest error to refuse this instruction.

The sixth of plaintiff's instructions, is this:

"The court further instructs the jury, that if an agent makes any profits in the case of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal."

From what has already been said, it is apparent that this instruction should have been given, and the court erred in its

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refusal. Some of the other instructions asked by plaintiff, were in harmony with the rules here announced, and should have been given.

Defendant below asked, and the court gave, among others, this instruction :

"If the jury believe, from the evidence, that there is any material point in the plaintiff's case which is not made out, except by the evidence of the plaintiff, and they should further believe that the defendant has testified directly the reverse of the plaintiff as to such material point; if the jury further believe, that plaintiff and defendant are entitled to equal credibility, then the plaintiff's case is not fully made out by a preponderance of the testimony, and the jury should find for the defendant."

This instruction is calculated to mislead the jury. So far as we can see, from the bill of exceptions, plaintiff was either corroborated or uncontradicted on all material points in his evidence. Defendant does not pretend he disclosed to plaintiff, that Ritchie only asked \$12 per acre, or that he intended to retain all over that sum; nor does he deny that he agreed to purchase at the lowest price for plaintiff; and, by his accepting and acting under the power of attorney, he became the agent of plaintiff. To call the attention of the jury to supposed evidence that does not exist, induces them to suppose the court sees such a state of facts in the evidence, and desires them to so regard it. Again, it is for the jury, from the evidence as given, together with the manner of the parties when they testify, and surrounding circumstances, to determine which is entitled to credit, and the jury should be so instructed when necessary.

The court, of its own motion, after refusing the plaintiff's instructions, gave this:

"The court instructs the jury, that if they believe, from the evidence, that Holliday, the defendant, was the agent of the

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Opinion of the Court.

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plaintiff, Cottom, in making the purchase of the land from Ritchie, and not the agent of Ritchie in the sale of the land, and that, as such agent, defendant purchased said lands for \$12 per acre from Ritchie, for plaintiff, and charged the plaintiff \$15 per acre for the same, and received the money, then the plaintiff would be entitled to a judgment for the difference in the value of the land at \$12 per acre and \$15 per acre."

This instruction does not present the law correctly ; it only allows plaintiff to recover if the defendant was not the agent of Ritchie. Under this instruction, if defendant was the agent of Ritchie, plaintiff could not recover, no matter how illegal or fraudulent the acts of defendant. Under it, he would have immunity for any and all moneys, no matter how gross his misconduct. Such can not be the law. While the law says, that a person can not properly be the agent of both parties—buyer and seller—it can never hold, that because an agent so acts, without disclosing the fact, he shall not be held liable for his illegal acts. It is not for him to repudiate his agency, and thus profit by his own wrong. Plaintiff might, in a proper case, repudiate the acts of defendant as his agent, upon the ground that he was Ritchie's agent and did not disclose the fact, but defendant can not be heard to set up that he was Ritchie's agent, to justify his wrong to plaintiff. He has assumed the relation of agent for plaintiff, in purchasing the farm, and he must be held to a strict performance of all the duties, and to all the liabilities the relation imposes, without reference to whether he was, or not, Ritchie's agent. This instruction was erroneous, and no doubt controlled the jury in their finding.

The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

ELIJAH GADDY

v.

JOHN K. McCLEAVE.

1. **MOTIONS**—*whether a part of the record unless preserved by bill of exceptions.* Upon appeal from the judgment of the circuit court in an action on a promissory note, the sustaining of plaintiff's motion to strike the defendant's plea denying the execution of the note from the files, being assigned for error, this court refused to consider the same for the reason that the bill of exceptions did not show any such motion was made, or any ruling of the court upon it, or that any exception was taken. Motions of such a character do not become a part of the record unless made so by a bill of exceptions.

2. **PLEADING AND EVIDENCE**—*variance.* In an action on a promissory note which recited that it was "given for a right to clarify cider, ale, etc.," but the pleader, in declaring on the note according to its legal effect, omitted any such description, but otherwise described it correctly, it was *held*, there was no variance between the note and the declaration. It was not necessary that the declaration should set forth the particular consideration for which the note was given, although mentioned in the note.

3. **PLEA denying execution of a promissory note**—*admissibility of evidence under, when not verified by affidavit.* Under a plea denying the execution of the note sued on, but not verified by affidavit, the defendant will not be permitted, on the trial, to deny his execution of the note.

APPEAL from the Circuit Court of Lawrence county; the Hon. R. S. CANBY, Judge, presiding.

. This was an action of assumpsit, brought by John K. McCleave against Elijah Gaddy, upon the following promissory note:

\$100.

LAWRENCE Co., ILL., July 12, 1868.

. One year after date, I promise to pay to the order of H. B. Graves & Co., one hundred dollars, with interest, value received, it being given for a right to clarify cider, ale, etc., etc.

ELIJAH GADDY.

INDORSED: For value received, I assign the within note to J. K. McCleave.

H. B. GRAVES &amp; Co.

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Statement of the case. Opinion of the Court.

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The declaration alleged, that the defendant, "on the 12th day of July, 1868, by his promissory note of that date, by him given and subscribed, for value received, promised to pay to Henry B. Graves and John Clark, trading and doing business under the name of H. B. Graves & Co., the sum of \$100 one year after date, with interest, which period had elapsed before the commencement of the suit. And the said Henry B. Graves and John Clark, on the 14th day of July, 1868, then and there indorsed the same to the plaintiff, under the name and style of H. B. Graves & Co., whereof the defendant had notice, and then and there, in consideration of the premises, promised to pay the amount thereof according to the effect and tenor thereof." Breach, that he has not paid, etc.

The defendant pleaded non-assumpsit, and that he did not make and execute the note in question. A trial by jury resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Mr. J. G. BOWMAN, for the appellant.

Mr. E. CALLAHAN, for the appellee.

PER CURIAM: The record in this case is in a state of great confusion and disorder.

The proceedings appear disconnectedly, and without regard to the order in which they took place. This mode of making up a record, meets our reprehension.

The first error assigned is, in sustaining plaintiff's motion to strike the affidavit verifying the plea denying the execution of the note from the files. But this we can not consider, for the reason that the bill of exceptions does not show that such a motion was made, or any ruling of the court upon it, or any exception taken. We have repeatedly held, that motions of this character do not become a part of the record unless made so by means of a bill of exceptions.

The next error assigned is, in the admission of the note in evidence.

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The note recites, that it was "given for a right to clarify cider, ale, etc." The declaration omits any statement of this—and it is claimed that this constitutes a variance between the note and declaration. The declaration described the note correctly, as far as it went in describing it; there was no misdescription of the note; all that can be said is, that the note was not described so fully as it might have been. There was no variance between the note and declaration. It was unnecessary that the declaration should set forth the particular consideration for which the note was given, although mentioned in the note.

The third error assigned is, in the exclusion of evidence offered by the defendant, that he did not make the note.

As neither of the defendant's pleas appears to have been verified by affidavit, he was not permitted, on trial, to deny his execution of the note.

Perceiving no error in this record, the judgment is affirmed.

*Judgment affirmed.*

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CHARLES KARCH, impleaded with Albert Hall,

v.

CHARLES L. EMERICK.

1. SPECIAL PLEA—*amounting to general issue.* To a declaration in an action on a promissory note against two defendants, alleging that the defendants executed and delivered the note to the plaintiff, a plea of one of the defendants, in form special, averring that the consideration for the note was received by his co-defendant, and was the individual debt of such co-defendant, and denying his joint liability, is bad on a special demurrer, that it amounts only to the general issue.

2. PLEADING—*of the description of the makers of a note—whether as partners.* In an action on a promissory note, the plaintiff, in the commencement of his declaration, complained of A B and C D, partners, etc., defendants, in a plea, etc., and then alleged that the defendants made their certain promissory note in writing, by which said note said defendants, by the

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Syllabus. Opinion of the Court.

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name, style and description of A B, promised to pay, etc.: *Held*, the word "partners" in the commencement of the count was merely descriptive of the persons, and had nothing to do with the character in which the defendants executed the note, and hence, to such a count, a plea denying the partnership would present an immaterial issue, and a plea denying the execution of the note, verified, was a complete answer to the declaration.

WRIT OF ERROR to the Circuit Court of St. Clair county ;  
the Hon. JOSEPH GILLESPIE, Judge, presiding.

Messrs. WINKELMAN & BONEAU, for the plaintiff in error.

Messrs. HAY & KNISPEL, and Messrs. C. W. & E. L. THOMAS, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The notes upon which this action is brought, are signed by Albert Hall. The declaration contains two special counts upon notes, and the common counts.

To the declaration, the plaintiff in error filed three pleas.

*First*, The general issue, which was verified by affidavit.

*Second*, A special plea, in which it was averred that the sole consideration of the notes sued on was merchandize, and real estate sold and conveyed to his co-defendant, Hall, and that the same was, and is, the individual debt of Hall, and that he is not jointly liable therefor. The third plea is like the second, except it is alleged that the consideration of the notes was money loaned by the defendant in error to the said Hall.

A general demurrer was interposed to each of these pleas, and for cause of special demurrer to the second and third pleas, it is said that they amounted only to the general issue. The court sustained the demurrer, and the plaintiff in error electing to stand by his pleas, judgment was rendered against him and Hall for the amount of the notes.

The only error assigned is, the decision of the court sustaining the demurrer to the several pleas.

The second and third pleas, although in form special pleas, were in effect simply a denial of any liability on the part of Karch, and amounted to no more than the general issue, and

## Syllabus.

therefore the special demurrer, for that reason, was properly sustained as to them.

The first plea is the general issue verified by affidavit. It presents a complete answer to the whole declaration, and the demurrer was improperly sustained as to it.

The first count of the declaration is, that the plaintiff complains of Charles Karch and Albert Hall, partners, doing business under the name, firm and style of Karch & Hall, defendants, in a plea, etc. It then alleges, that the defendants made their certain promissory note in writing, by which said note said defendants, by the name, style and description of Albert Hall, promised to pay, etc.

The word "partners," in the commencement of the count, is merely descriptive of the persons, and has nothing to do with the character in which they executed the note. It is not averred that they executed it as partners. *Johnson v. Buell*, 26 Ill. 66. Neither of the other counts avers any promise or undertaking made by the defendants as partners. A plea denying the partnership would, therefore, have presented an immaterial issue. The plea of the general issue, verified, put the execution of the note in issue, and it was error to sustain the demurrer to that plea; for which the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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| 59   | 186 |
| 23a  | 655 |
| 59   | 186 |
| 31a  | 612 |
| 59   | 186 |
| 57a  | 46  |
| 59   | 186 |
| 101a | 308 |

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ALEXANDER WALTER *et al.*

v.

FREDERICK BIERMAN.

APPEAL FROM JUSTICE OF THE PEACE *by one of two defendants.* One of two defendants against whom a judgment had been rendered, in a justice's court, took an appeal therefrom to the circuit court, and without any summons having been issued to bring in the other defendant, or his appearance having been entered, the circuit court at the next term thereof, after



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such appeal was perfected, upon the motion of the party who recovered the judgment, dismissed the appeal with a procedendo and rendered judgment against both defendants "for damages in the delay in taking said appeal" and for costs: *Held*, that this was error, the circuit court having no jurisdiction, under the statute, to render judgment against the defendant not joining in the appeal, without summons issued against him, notifying him of such appeal and requiring him to appear, etc., to be served as other process issued in appeal cases, and if the summons be returned not found, the cause, at the first term, to stand continued, but at the second term shall be tried—when the court would have power to render the same judgment as though both defendants had joined in the appeal.

WRIT OF ERROR to the Circuit Court of Clinton county;  
the Hon. SILAS L. BRYAN, Judge, presiding.

Messrs. WINKELMAN & BONEAU, for the plaintiffs in error.

Mr. G. VAN HOOREBEKE, for the defendant in error.

Per CURIAM: On the 26th day of October, 1870, the defendant in error recovered a judgment in justice's court against plaintiffs in error, for \$47.57. On the 8th day of November, 1870, Charlotte Walter, one of the defendants below, alone took an appeal from said judgment to the circuit court of Clinton county, a term of which was begun on the 14th of the same month of November. On the 22d day of that month, without any summons having been issued, to bring in Alexander Walter, or his appearance having been entered, the circuit court, on the motion of appellee, in that case, dismissed the appeal with a procedendo, and rendered a judgment against both plaintiffs in error for \$4.75 cents, "the same being" (as the record recites) "for damages in the delay in taking said appeal," and also a judgment for costs against both.

This was error. The 63d section of Chapter 59 of the Revised Statutes, of 1845, page 324, declares, that one or more plaintiffs, or defendants, in causes decided by justices of the peace, shall be allowed the right of appeal to the circuit court, without the consent of the others. The 64th section of same

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Syllabus.

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chapter provides, that when an appeal bond shall be executed by one of several parties, from the judgment of a justice of the peace, the clerk of the circuit court shall issue a summons against the other parties, notifying them of the appeal in the circuit court, and requiring them to appear, etc. ; which summons shall be served as other process issued in appeal cases, and in case such summons shall be returned that parties are not found, the cause shall, at the first term of the court, be continued, but at the second term shall be tried, and the court have power to give the same judgment in appeals, taken under the provisions of this chapter, as though all the parties to the judgment had joined in the appeal.

It is manifest, from these provisions of the statute, that the circuit court had no jurisdiction to render the judgment for damages and costs against Alexander Walter, and for this reason the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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GEORGE VASEY

v.

BOARD OF TRUSTEES, TOWNSHIP ONE, SOUTH OF RANGE  
TWO WEST, IN WASHINGTON COUNTY.

1. PRACTICE—*of the time of taking certain objections.* In a bill to foreclose a mortgage, it was alleged the mortgage was given to secure a certain promissory note, which appeared to be signed by four persons, when, in fact, one of the makers signed the note after the mortgage was given: *Held*, even if there was no allegation to meet the changed character of the note, the objection came too late when made for the first time in the appellate court; it should have been made in the court below, so that, if necessary, the bill could have been amended.

2. ALLEGATIONS AND PROOFS—*as to the purpose of the mortgage.* But the allegation that the mortgage was given to secure that particular note, was

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substantially true, although it was signed by one of the makers after the mortgage was given. It was the same note, except there was an additional security.

3. A PAROL PARTITION of land among several tenants in common, to be valid, must be followed up by a several possession.

4. SAME—*presumption*. Exclusive possession by one, of a particular part of the estate, accompanied by a denial of the co-tenant's right to such part, may create a legal presumption of partition.

5. HOMESTEAD—*abandonment*. It is not essential to the waiver of the homestead right that there should be a formal release thereof in writing, but the right may be lost by an abandonment of the premises.

6. The husband, as the head of the family, has the right to control the residence of his wife and children. Where the husband, with his family, abandons the premises to ruin, and locates elsewhere, he ceases to occupy them as a residence, and such occupancy is necessary to the existence of the homestead right.

7. So, where the owner of land, which he occupied as a homestead, executed a mortgage thereon, but without releasing the homestead right formally in writing, and afterwards abandoned the premises without intending to return to them, this was held to be such a waiver of the homestead in favor of the mortgagee, that a subsequent conveyance of the premises by the mortgagor, with a formal release of the homestead right, in writing, would not operate to pass any right to his grantee, in respect to the homestead, which could be asserted against the mortgage.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. J. M. DURHAM, for the appellant.

Mr. AMOS WATTS, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The facts of this case are briefly as follows:

Benjamin and Fountain Seawell purchased the land in controversy, in the year 1855. In 1860, they, with their wives, executed a mortgage on the premises to appellees, to secure the payment of a note then signed by them and Samuel Seawell. Thomas Seawell signed the note sometime after the execution of the mortgage.

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Opinion of the Court.

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It is claimed, that parol partition was made between the two Seawells soon after the purchase. There was no possession in conformity therewith. Benjamin was never in possession, and the occupancy of Fountain was of the whole tract, so far as it could be.

In 1866, Fountain Seawell conveyed the land to appellant, having purchased his brother's interest a short time before the sale. In the deed to appellant, the right of homestead was waived, but there was no release of it in the mortgage.

A bill was filed to foreclose the mortgage, and it was alleged therein that the mortgage was executed to secure the note signed by the four Seawells.

Appellant answered, and filed a cross bill, setting up the parol partition, and claiming the right of homestead in him, as grantee of Fountain Seawell.

The first objection is somewhat technical, that the allegation, as to the object of the mortgage, was not sustained. It is true, that Thomas had not signed the note at the date of the mortgage, still the allegation is substantially true. The note was of the same date, and for the same amount; in fact, it was the same note, to secure which the mortgage was given—except there was an additional security.

Concede that there was no allegation to meet the changed character of the note, the objection should have been taken in the court below. If sustained, the bill might have been amended. As was said by this court, in *Webb et al. v. The Alton Marine and Fire Insurance Co.* 5 Gilm. 223, a party should not be permitted to remain silent while a cause is progressing, and then raise such objections at the hearing, or in the appellate court. Such practice would not be promotive of justice.

We are not satisfied that there was any parol partition. It was evidently intended, but never consummated. Even if it was agreed upon, there was no several possession; and there is no evidence of either actual or constructive notice of such partition. A parol partition, to be valid, must be followed up by possession.

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Opinion of the Court.

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These parties were tenants in common. Exclusive possession of one, of a particular part of the estate, accompanied by a denial of the co-tenant's right to such part, may create a legal presumption of partition. *Tomlin v. Hilyard*, 43 Ill. 300; 1 Wash. on Real Prop. 430.

The facts do not show such relation between the parties.

Was there any abandonment of the homestead? It is contended, that there can be no release or waiver of this right, except in writing, and in the mode directed by the statute, and that it is the policy of the law to restrain the alienation of the home, and secure it for the wife and children.

The law does exempt a certain amount of property from levy and forced sale. In this regard, the law is liberal and benevolent; and this policy of securing a home for every head of a family, has always been fostered by the courts. But the law does not prevent the alienation of the homestead. It is not guilty of the absurdity of confining a man to a particular habitation. The ambulatory character of our population would resent such a restriction. If the citizen desire a hearth and a domestic altar, he can enjoy them, exempt from levy and forced sale, but the law will not force them upon him.

Nine months before the conveyance to appellant, Fountain Seawell had removed from the premises. He says, he intended to return. The facts wholly repel such intention. He left the house; placed no tenant in it; cultivated no portion of the place, and made no use whatever of it. He had executed a mortgage upon it, and the testimony is satisfactory, if not conclusive, that there was a total abandonment. He was still out of possession, at the time of the sale and conveyance to appellant. There is no proof of the *animus revertendi*.

The husband was the head of the family, and had the right to control the residence of his wife and children. The first section of the homestead act exempts the property of the debtor during the life of the husband, if "occupied as a residence." Where the husband, with his family, abandons the

premises to ruin, and locates elsewhere, it can not be said that he occupies them as a residence.

All the questions involved have so often been decided by this court, that we must regard them as settled.

We therefore hold, that the mortgage was not void, and that the homestead right had been waived by abandonment of the premises. *Brown v. Coon*, 36 Ill. 243; *Titman v. Moore*, 43 Ill. 170; *McDonald v. Crandall*, id. 231; *Wright et al. v. Dunning*, 46 Ill. 271; *Hewitt v. Templeton*, 48 Ill. 367; *Buck v. Conlogue*, 49 Ill. 391.

The decree of foreclosure is affirmed.

*Decree affirmed.*

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ILLINOIS CENTRAL RAILROAD COMPANY

v.

RICHARD DUNNING.

NEW TRIAL—*verdict against the evidence*. It was assigned for error on this record, that the evidence did not support the finding of the jury, but the court regards the verdict as fully sustained thereby.

WRIT OF ERROR to the Circuit Court of Pulaski county; the Hon. JOHN OLNEY, Judge, presiding.

This was an action on the case, brought by Dunning against the railroad company, to recover the value of a mare belonging to the plaintiff, killed by the defendant's engine and train. A trial in the circuit court resulted in a verdict and judgment for the plaintiff. The defendants bring the record to this court and ask a reversal of the judgment.

Messrs. GREEN & GILBERT, for the plaintiffs in error.

Messrs. CASEY & PATTON, for the defendant in error.

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Per CURIAM: This was an action against the Illinois Central Railroad Company for killing a mare. It is objected, that the evidence does not show the road had been opened for six months, or that the mare was not killed outside of a village, town or city, or not killed at a road crossing. We are of opinion the verdict is fairly sustained by the evidence on all these points.

*Judgment affirmed.*

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JAMES H. SILVERS

v.

GREEN L. CHITWOOD,

and

THE SAME

v.

RUDOLPH S. HARLEY.

**CONSTRUCTION of a contract.** A and B entered into a contract, by the terms of which A was to break and fence eighty acres of land. For the breaking, B was to pay \$3 per acre, and for the fencing, \$6 per hundred rails, A doing the work and furnishing the materials. After specifying the details in regard to this part of the transaction, the contract provided that A should put in a crop of wheat in the fall of that year—1869—B furnishing the seed, and the proceeds of the crop to be equally divided. The contract then provided as follows: "The said A further agrees, that he will thoroughly prepare the ground of the said eighty acres, and sow the same in wheat, in the fall of the year 1870, upon the same terms and conditions as aforementioned for the year 1869." *Held*, A was not entitled to \$3 per acre for preparing the land for wheat in the fall of 1870, but was to prepare the ground and sow the wheat on the same terms as specified for the preceding year, that is, an equal division of the crop.

APPEAL from the Circuit Court of Marion county; the Hon. S. L. BRYAN, Judge, presiding.

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Statement of the case.

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The contract upon which this suit was brought, was as follows :

Agreement between G. L. Chitwood, of Marion county, Illinois, and J. H. Silvers, of Cincinnati, Ohio, agent for the heirs of Edwin D. Dodd, deceased, witnesseth, and whereas, the said heirs are owners, and the said Silvers is agent for the following described subdivisions of section eleven, (11,) township two (2) north, range one (1) east, of third principal meridian, viz : Southwest quarter of northeast quarter, containing forty acres, more or less ; also, the northwest quarter of the southeast quarter, containing forty acres, more or less, containing in all eighty acres, more or less. The said G. L. Chitwood agrees, that he will furnish good, sound, new rails, made of the best timber to be procured in said locality, necessary for fencing the above described eighty acres, and he further agrees that he will lay said fence with a four foot worm, six rails high, staked and double ridged, making eight rails and two stakes to each single panel all around said eighty acres, except where said eighty acres joins and is on the line with other property already under fence, and that portion of the line adjoining the southwest quarter of the northeast quarter, containing forty acres, and he agrees to lay the worm of said fence on chunks, to be properly placed under each single panel.

He also agrees to properly set said stakes in holes not less than eight inches deep, and to completely fill up all the holes around said stakes, and that he will lay up said fence in a straight line, and the centre of said fence shall be on the line of said eighty acres, (as per survey of the county surveyor,) in the middle of said fence row. He also agrees, that said fence shall be laid up, including chunks, stakes, and riding, completed, and done in the best husband-like manner. Said Chitwood agrees that he will furnish the rails, stakes, riders, and chunks, and that he will lay the worm, put chunks under said fence, and lay it up in the manner aforesaid for six dollars



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Statement of the case.

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(§6) for each and every one hundred (100) rails, stakes and riders, contained therein, as herein specified. Said Chitwood further agrees that he will, in a good husband-like manner, completely break up said eighty acres in time to prepare the same to be sown in wheat in the fall of the year 1869, in consideration of the sum of \$3 per acre to be paid him for said breaking.

Said J. H. Silvers, agent, agrees to furnish the seed wheat, and the said Chitwood agrees to thoroughly prepare the ground, and sow the said eighty acres with the said seed, for which the said Chitwood shall be entitled to one half the products of the said crop, to be equally divided in the half bushel, between the said J. H. Silvers, agent, and the said Chitwood, when threshed, which the said Chitwood agrees to do at the earliest practicable period, after the wheat has been harvested, of which he agrees to give the said Silvers due notice. The said Chitwood further agrees that he will thoroughly prepare the ground of the said eighty acres, and sow the same in wheat, in the fall of the year 1870, upon the same terms and conditions as aforementioned for the year 1869; and at the same time he sows the said eighty acres in wheat, in the fall of 1870, he also agrees to seed the same in timothy grass, in a proper and husband-like manner, on condition that the said J. H. Silvers, agent, furnish the seed therefor. The said J. H. Silvers, agent, agrees to pay the said Chitwood the sum of six dollars (§6) per hundred for the rails, stakes and riders, laid in the fence, as herein specified, and this amount is to include the entire cost to be paid by the said Silvers, agent, for fencing the said eighty acres.

The said J. H. Silvers, agent, also agrees to pay to the said Chitwood the sum of three dollars (§3) per acre for breaking the said eighty acres, as herein specified, on the 1st day of January, 1870. The said Chitwood agrees that he will treat said land, while he is in possession of the same, or occupying it (on the conditions expressed) in a good husband-like manner, and that during said period, he will keep said fences in as good

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Statement of the case. Opinion of the Court.

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repair as when he first completed the same, ordinary wear and tear excepted, and that he will use proper care to protect them against fire, and that he will put no crop thereon but a wheat and grass crop, as herein specified, and use it for no other purpose, and further, that he will yield up possession of the same, in the year 1871, as soon as the wheat crop is harvested and can be taken off, with the fences in as good order as when first completed, ordinary wear and tear excepted. The said Chitwood agrees to allow the said J. H. Silvers, agent, \$5 per hundred for all rails, stakes or riders, furnished by him, properly distributed on the north line of said eighty acres, commencing at the northwest corner, and continuing eastward on the said eighty acres, previous to the first day of August, 1869, such number of rails, stakes and riders, so furnished by the said J. H. Silvers, agent, to be deducted at the rate of \$5 per hundred, from the amount of the said Chitwood's bill for fencing, at the rate of \$6 per hundred, as herein specified.

J. H. SILVERS, Agent, [L. s.]

GREEN L. CHITWOOD, [L. s.]

ODIN, Marion Co. Ill., Feb. 17, A. D. 1869.

Chitwood sought to recover \$3 per acre for preparing the land for wheat in the fall of 1870, and the question is presented, whether that claim is sustained by a proper construction of the contract.

A trial resulted in a judgment against Silvers, from which he appealed.

Mr. WILLIAM WALKER and Mr. B. B. SMITH, for the appellant.

Mr. H. C. GOODNOW and Mr. W. W. WILLARD, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Chitwood against Silvers, upon a contract made between them, on the 17th day of February, 1869. By the terms of the contract, Chitwood was to

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break and fence eighty acres of land. For the breaking, Silvers was to pay \$3 per acre, and for the fencing, \$6 per hundred rails, Chitwood doing the work and furnishing the materials. After specifying the details in regard to this part of the transaction, the contract provides that Chitwood shall put in a crop of wheat in the fall of 1869, Silvers furnishing the seed, and that the proceeds of the crop shall be equally divided. The contract then provides as follows :

“The said Chitwood further agrees, that he will thoroughly prepare the ground of the said eighty acres, and sow the same in wheat, in the fall of the year 1870, upon the same terms and conditions as aforementioned for the year 1869; and at the same time he sows the said 80 acres in wheat, in the fall of 1870, he also agrees to seed the same in timothy grass, in a proper and husband-like manner, on condition that the said J. H. Silvers, agent, furnish the seed therefor.”

The question presented by the record is, whether Chitwood is entitled to recover \$3 per acre, by virtue of this last clause, for preparing the land for wheat in the fall of 1870. We think it clear, he is not. The proper construction of the contract is, that Chitwood was to raise a crop in 1870, on the same terms upon which he raised one in 1869. That was an equal division of the crop, the landlord furnishing the seed—a very common arrangement between landlord and tenant. The \$3 per acre paid in 1869, for breaking up the land, was like the \$6 per hundred rails for fencing, a part of the contract entirely distinct from that in regard to the raising of a crop. It is very unreasonable to suppose the parties intended this \$3 per acre should be paid the second year for merely plowing the land for a crop.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

JOHN FIELD,

v.

NATHANIEL F. CARR *et al.*

1. *DEDICATION of a street to the public—what constitutes.* In the year 1817, the owner of the land on which the town of Golconda, in Pope county, in this State, is situated, laid off the same into town lots, streets and alleys, and made and recorded a plat of the town thus laid out. A memorandum was endorsed on the plat, defining the width of the streets and alleys, "excepting Water street, which includes all of the ground from the front lots to the river." The plat was not signed or acknowledged. At that time there was no statute regulating the execution of town plats. This was held to be a sufficient dedication, by the common law, to the public, of all the ground between the lots fronting on the Ohio river, and the river itself.

2. *SAME—estoppel—subsequent conveyance.* The vendor of the party who thus laid out the town, having filed a bill in chancery to subject the lots to the payment of the purchase money, and the sale under the decree in that suit being made according to the plat, purchasers at such sale would be estopped to deny the validity of the plat, and a conveyance by the commissioner who executed the decree, of the ground so dedicated to the public, would pass no title thereto.

WRIT OF ERROR to the Circuit Court of Madison county ;  
the Hon. JOSEPH GILLESPIE, Judge, presiding.

Mr. JAMES M. WARREN, for the plaintiff in error.

Mr. WESLEY SLOAN, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a bill in chancery, filed on the 28th day of April, 1862, by defendants in error against plaintiff in error. The bill charges that the bank of the Ohio river in front of the town of Golconda, in Pope county, in this State, is a public landing, and has been used as such by the public about forty years, and that complainants have the right to use the same as such ; that Thomas Furguson, having purchased the lands, including the grounds in question, of the general government,

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on or about the 15th day of March, 1817, sold the same to Green B. Field, except 20 acres previously conveyed to Pope county, and except also some lots in the town, and some fractional parts of lots on the southwest side of the 20 acre tract; that Field, on the 20th of May, 1817, laid off the town of Golconda on this tract of land, and on the site of the town of Sarahsville, into town lots, streets, alleys and a public square. He made and recorded a plat of the town thus laid out. It is claimed that the street marked Water street on this plat includes all of the ground between the front of the lots of the town to the Ohio river, and including the river bank as a part of the street. On the 23d of January, 1817, the county court of Pope county changed the name of the town from Sarahsville to Golconda.

It appears that on the 20th day of February, 1819, Ferguson conveyed lot 66, which he had reserved in his sale to Field, to one Smith, describing it by the plat he had previously made, and as corresponding with lot 65 in the town of Sarahsville; that at the March term, 1820, the county commissioners' court appointed Willis to survey and plat the 20 acres conveyed to the county by Ferguson, which he did, and the plat was recorded.

Green B. Field having failed to pay Ferguson for the land, the latter filed his bill in chancery in the Pope circuit court to enforce its collection, when the court decreed its sale, and commissioners were appointed to execute the decree. They made sale of the lots laid off and platted by Ferguson, and reported the sale, and it was approved by the court.

It also appears that Daniel Field purchased a portion of the town lots sold by the commissioners. It appears plaintiff in error is the son and heir of Daniel, and derives title by inheritance from his father; that, in assertion of his title, he had commenced suits in ejectment and trespass against complainants for mooring wharf boats against the river bank, and this suit was commenced to enjoin their further prosecution.

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Opinion of the Court.

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On a hearing, the court below granted the relief sought, and rendered a decree enjoining the suits at law. The record is brought to this court and various errors assigned.

The main question, and the only one we deem material, is, whether the ground in dispute was dedicated to the public. By Field's plat, which was made and recorded in 1817, it appears from a memorandum then endorsed upon it and recorded, that the streets were 60 feet wide, and the alleys 12, "excepting Water street, which includes all of the ground from the front lots to the river. The lots are 132 by 66, except fractional lots." This plat is not signed and acknowledged, as required by the law now in force, which was adopted after this plat was made and recorded; but it appears that Field, the ancestor of plaintiff in error, made the plat and had it recorded, and as there was no statute regulating the execution of town plats when this was made and recorded, its effect must be governed by common law principles. Had this plat been made and acknowledged under the statute, then the title to the streets and alleys would have vested in the town, for the use of the public, precisely as if conveyed to it by the owner, with the use declared.

It has been held, that a dedication to the public may be made in either of several modes. If parties owning the land make a survey and lay off ground for public use, such as a street or landing, and make sales in reference thereto, such acts amount to a dedication of such ground to the public; and that a map is not essential to the validity of the dedication. *Godfrey v. The City of Alton*, 12 Ill. 30.

It has likewise been held, that a dedication may be made by grant or written instrument; it may be evidenced by acts or declarations, without writing, no particular form being required to give it validity, as it is purely a question of intention. It may be made by survey and plat alone, without any declaration, either oral or written, on the plat, when it is evident, from the face of the plat, that it was intended to set

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apart certain grounds for the use of the public. *Marcy v. Taylor*, 19 Ill. 634; *Waugh v. Leech*, 28 Ill. 488. When a person performs an act manifesting an intention to dedicate ground to the public for a particular purpose, and it is accepted by the public, he has no power subsequently to change his purpose and resume the grant. *Proctor v. The Town of Lewiston*, 25 Ill. 153. It has also been held, that the intention of the owner, manifested by express consent, or by acquiescence in the user of the thing, will create dedication, *Warren v. Town of Jacksonville*, 15 Ill. 236, *Dimon v. The People*, 17 Ill. 422, *Marcy v. Taylor*, *supra*, and that the making and recording of a town plat, under the statute, is the highest evidence of the streets and alleys marked on the plat. *Waugh v. Leech*, *supra*. Other authorities might be referred to, but the principles announced in these are sufficient for the determination of the case at bar.

The plat was made and recorded by Green B. Field, and it was recognized by Fergusson in his bill to render the land liable to his debt for the purchase money. It was recognized by the court, and the commissioners in making the sale by it. And Daniel Field, from whom plaintiff in error inherited the lots in Golconda, recognized the plat by purchasing from the commissioners by this plat, and receiving conveyances for the lots by the numbers given them on this plat. Green B. Field, by making the survey and plat and recording it, manifested the clearest and most unmistakable intention to dedicate the streets and alleys to the public. He marked and named the streets, described their width, and especially defined Water street, embracing the ground in controversy, as a street extending from the front lots to the Ohio river. Although not signed or acknowledged, it was an unequivocal act, which as clearly manifested an intent to dedicate this ground to the public, as if it had been conveyed to the public. In the one case, it is the clear and unmistakable act of the party, while in the other it is his written declaration.

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This plat was recorded as early as 1818, and by it Water street was bounded by the river, as shown by the memorandum written on the plat. This was the only plat of the town known, till 1833. Then, as Furguson caused the lots to be sold under it, and conveyed under it, and as Daniel Field purchased under it, they were estopped to deny its validity; and plaintiff in error having derived his title by descent from Daniel Field, who was estopped to deny it, he is also estopped, as a privy in estate. It also appears that the street was recognized by use by the public, as described in the plat. It hence follows that the subsequent conveyance by the commissioners to the river did not and could not affect the rights of the public to the dedication, and passed nothing, as the land covered by the dedication was not subject to sale, as it had become a public street.

Again, this ground had been used by the public as a street for about forty years, and we fail to find that plaintiff in error, or his ancestor, ever set up any claim as against the public to this ground, unless it be simply by having a deed from the commissioners.

A careful consideration of all the evidence in the case proves clearly, to our minds, that Green B. Field intended to and did dedicate this ground to the public, and that it was accepted; that Daniel Field recognized the dedication, and plaintiff in error derived title subject to the dedication, and has no right to the land, and that the court below did right in enjoining the further prosecution of the suits at law.

The decree must be affirmed.

*Decree affirmed.*



WILLIAM REEVES *et al.*

v.

## ANN REEVES.

1. DECREE FOR DOWER—*construction thereof*. In a proceeding for assignment of dower in certain premises in which the widow was only entitled to dower in the one undivided half thereof, the decree rendered therein directed: "that the said dower \* \* \* be a lien on the said premises, to wit: on the undivided half of the lands hereinafter described." Upon objection to the decree, that it made the dower a lien on the whole of the premises, it was regarded as not open to such objection.

2. CHANGE OF VENUE—*prejudice of the judge*. A party made application in the circuit court for a change of venue, on the ground of the prejudice of the judge, which was refused. It appeared the cause had been previously before this court, and remanded to the court below with direction that it enter a specific decree: *Held*, the court properly refused the application, as it was hardly supposable that any degree of prejudice could interfere to prevent the circuit judge from correcting the decree according to the direction of this court.

3. And besides, the petition was insufficient, in that it failed to state the cause for which the change was asked had arisen or come to the knowledge of the applicant, subsequent to the term at which the application might have been made.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Messrs. SNYDER, KASE & WILDERMAN, for the appellants.

Messrs. T. & L. KRAFFT, for the appellee.

Per CURIAM: This cause was before this court at the June term, 1870, upon an appeal taken by the same appellants. Several errors were assigned, and the questions arising upon them fully discussed by counsel. This court, upon that appeal, sustained the right of the appellee to the relief sought by her bill, but reversed the decree of the court below, because it made appellee's dower a lien on all of the premises instead of upon an undivided half; and also because the decree was defective in not determining by whom the rents and profits were to be paid.

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Opinion of the Court.

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The decree was reversed and the cause remanded, in order that the decree might be corrected in these particulars. The cause coming before the circuit court on such reversal, appellants made an application for change of venue in the cause, on account of the prejudice of the judge, which was overruled. The former decree was then corrected in conformity with the decision of this court, and the cause brought here again by appeal.

Appellants now insist that by the amended decree the dower is made a lien upon the whole premises. The language of the decree is, "that the said dower of said Ann Reeves be a lien on the said premises, to wit: on the undivided half of the said lands hereinafter described." They also claim that the seizin of John Reeves, the intestate, was not shown. William Reeves expressly admits in his answer the seizin of John Reeves, as alleged in the bill of complaint, and the other appellants, as well as William, claim under John Reeves; besides, his seizin in law was established by the evidence.

There is nothing in any of these objections, nor in the point that the court erred in overruling the application to change the venue. It is hardly supposable that any degree of prejudice could interfere to prevent the circuit judge from correcting the decree according to the direction of this court. But conceding that it might, and that appellants had the right in this stage of the case to make the application, yet their petition is insufficient, because it does not state that the cause for which the change was asked had arisen, or come to their knowledge, subsequent to the term at which the application might have been made.

The decree must be affirmed.

*Decree affirmed.*

## Syllabus.

ALFRED B. SAFFORD

v.

ROBERT MILLER *et al.*

|       |      |
|-------|------|
| 59    | 205  |
| 22a   | 483  |
| 59    | 205  |
| 688a  | 673  |
| 59    | 205  |
| d106a | 7416 |

1. **DEMURRER**—*carried back*. It is a general rule, that, upon demurrer, the court should, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance.

2. **PLEA**—*traversing conclusion of law*. A plea is bad which is a traverse of a mere conclusion of law.

3. **PLEADING**—*declaration on penal bond*. In actions brought on penal bonds, conditioned for the performance of covenants, the statute requires the obligee to assign breaches; and though the action be debt, yet, in respect to the assignment of breaches, it is assimilated to the action of covenant, and governed by the same rules. Each assignment of breaches is regarded as a declaration, and to be pleaded to as such.

4. **SAME**—*in an action upon a covenant to two, jointly—of an assignment of a breach for damages to one*. In an action by two obligees, upon a bond for the performance of covenants wherein the legal interest of the obligees is joint, a count, or assignment of breaches, for particular damages resulting to one of the plaintiffs individually, is bad in substance.

5. So, where an injunction bond recited that the principal obligor had obtained an injunction restraining A and B from the further prosecution of certain suits at law, commenced respectively by the said A and B, and conditioned "that if the obligor shall pay, or cause to be paid, to the said A and B all such damages as they may sustain by reason of the issuing of said injunction, and also such costs and damages as may be awarded against the said obligor by the court in case the said injunction herein shall be dissolved, then," etc., it was *held*, in an action on the bond by A and B, the bill having been dismissed, that a breach in the declaration, claiming damages resulting to one of the plaintiffs alone, by reason of being deprived, by means of the injunction, of the possession and the enjoyment of the rents and profits of certain premises owned by him, was bad on demurrer, because it sought to recover for a separate injury to one, upon a covenant to him and another jointly.

6. **SAME**—*misjoinder of counts*. And in an action upon a covenant to two jointly, where some of the assignments of breaches are for damages resulting to both plaintiffs,—one for damages sustained by one plaintiff, and another for damages sustained by the other, as to which his co-plaintiff has no interest, there is a misjoinder of counts.

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Syllabus. Opinion of the Court.

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7. **OF ENTIRE DAMAGES, in such case.** And if, in such case of misjoinder of counts, entire damages be given upon all the counts, the judgment will be reversed on error. Nor would the fact that the action was brought in the name of both obligees, for the use of one, change the application of the rule in that regard.

8. **ASSIGNMENT.** An injunction bond is not assignable at law.

APPEAL from the Circuit Court of Alexander county; the Hon. DAVID J. BAKER, Judge, presiding.

Mr. W. J. ALLEN and Messrs. GREEN & GILBERT, for the appellant.

Messrs. MULKEY, WALL & WHEELER, for the appellees.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was an action of debt, brought in the Alexander county circuit court, by appellees against appellant, upon the joint and several bond of William Barker, W. P. Halliday and appellant, in the penal sum of \$1000, taken on the 20th day of May, 1864, the condition of which is as follows:

"The condition of the above obligation is such that, whereas the above bound William Barker has prayed for and obtained a writ of injunction from the circuit court of the county of Alexander, and State of Illinois, restraining and enjoining the said John Cheek and Robert W. Miller from proceeding further in the prosecution of certain suits at law, commenced respectively by said John Cheek and Robert W. Miller, against said Barker, in the said circuit court of Alexander county, Illinois, and which said suits are now pending and undetermined in said court, until the said court shall make other order to the contrary.

"Now, if the said William Barker shall pay, or cause to be paid, to the said John Cheek and Robert W. Miller all such damages as they may sustain by reason of the issuing of said injunction, and also such costs and damages as may be awarded

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Opinion of the Court.

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against the said complainant by the said court, in case the said injunction herein granted shall be dissolved, then this obligation shall be null and void: otherwise to remain in full force and virtue in law."

The declaration alleges the filing of the bond on the day and year aforesaid, and that afterwards such proceedings were had in the cause, in and by said circuit court, on to wit: the 8th of December, 1866, at the November term of said court, upon a final hearing of the cause in which the bond was given, that Barker's bill was dismissed by the court; from which decree Barker prayed and perfected an appeal to the Supreme Court, and on the 9th day of June, 1870, at the June term of the Supreme Court, held at Mount Vernon, the said appeal was dismissed by the court at the costs of appellees, and *procedendo* awarded. Several breaches were assigned:

*First.* That plaintiffs were put to great trouble and expense in employing solicitors in defending against said bill of complaint; that they paid to solicitors, and for costs and expenses, \$500.

*Second.* That Miller was put to great trouble and expense, and paid to solicitors, and for costs and expenses, a like sum.

*Third.* That Check was put to great trouble and expense, etc., and paid to solicitors, and for costs and expenses, a like sum.

*Fourth.* That at the time of suing out the injunction, said Robert W. Miller was the owner of certain premises (describing them,) upon which was a cottage and other improvements, etc., and, as such owner, was lawfully entitled to the possession thereof, and to receive the rents, issues and profits, amounting to \$100 per month; that, by reason of the injunction, he was kept out of the possession of the premises until the 10th of December, 1866, and deprived of the rents, issues and profits thereof for thirty months, amounting to \$3000, which had not been paid by Barker.

The fifth and sixth breaches were, substantially, like the fourth. The seventh, that a large amount of costs had been

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awarded to plaintiffs against Barker, to wit, \$100, which he had not paid.

Several pleas were filed, to the second and third of which a demurrer was sustained, upon which appellant obtained leave to amend his second plea, and to file additional pleas, under which the second plea was amended and additional pleas filed, to the number of twelve. Upon the pleas to the first and second assignments of breaches issue was joined. To the others, demurrers interposed.

The court overruled the demurrer to the fifth and tenth additional pleas, and sustained it as to the second amended plea, and the fourth, sixth, seventh, eighth, ninth, eleventh and twelfth additional pleas. Appellant elected to abide by his pleas; by leave of the court, withdrew his first original and the first, second, third and fifth additional pleas, including those upon which issue had been joined; whereupon his default was taken, and the court assessed entire damages upon all the counts or assignments of breaches to \$1000, and gave judgment.

The defendant brought the case to this court by appeal, and assigns for error the sustaining of the demurrer to said pleas, and the rendition of the judgment aforesaid.

The fourth additional plea was to the fourth assignment of breaches, and was as follows: "And for a further plea in this behalf as to the said fourth breach in said declaration mentioned, said defendant, by leave, etc., says *actio non*, because, he says, that at the time of the suing out of and service of said supposed writ of injunction, said Robert W. Miller was not lawfully entitled to the possession of the said premises in said fourth breach described, and to have, receive and enjoy the rents, issues and profits thereof, as alleged in said fourth breach; and of this said defendant puts himself upon the country."

The sixth additional plea, and to the same breach, after the formal part, was: "because he says that each and all the matters and things in said fourth breach alleged, in manner and

form as therein alleged, are untrue, and of this he puts himself upon the country."

The seventh additional plea was to the fifth breach, and was the same, excepting as to the number of the breach, as the 6th.

The eighth was to the sixth breach, and in the same form. The ninth was to the seventh breach, and in the same form.

To each of these pleas the court sustained a demurrer.

It is a general rule, that, upon demurrer, the court should, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance. The fourth plea, to which the special demurrer was sustained, was bad, because it was a traverse taken upon a mere conclusion of law, viz: that Miller was lawfully entitled to the possession, rents, issues, profits, etc.

But the fourth assignment of breaches, to which this plea was interposed, is bad in substance. The bond sued on is for the performance of covenants. By the statute, the obligees were required to assign breaches. *Patrick et al. v. Rucker*, 19 Ills. 429; *Hibbard v. McKindley*, 28 Ill. 240. In such a case, though the action be debt, yet, in respect to the assignment of breaches, it is assimilated to the action of covenant, and governed by the same rules.

Each assignment of breaches is regarded as a declaration, and to be pleaded to as such. *Burroughs v. Clancey*, 53 Ill. 30.

The covenant in the bond, so far as relates to the obligees, is joint. It is in these words: "That if the said William Barker shall pay, or cause to be paid, to the said John Cheek and Robert W. Miller all such damages as they may sustain by reason of the issuing of the said injunction, and also such costs and damages as may be awarded against the said Barker by the court, in case the said injunction herein shall be dissolved," then, etc.

These covenants are expressly and positively joint. "When the contract was made with several persons, whether it were under seal, or in writing but not under seal, or by parol, if

## Opinion of the Court.

their *legal interest* were *joint*, they must all, if living, join in the action, in form *ex contractu*, for the breach of it, though the covenant or contract with them was, in terms, joint and several." 1 Chit. Pl. 8; *Eccleston v. Clipsham*, 1 Saund. 153, n. 1; *Hatsell v. Griffith*, 4 Tyr. 487; *Bradburne v. Botfield*, 14 Mees. & Welbs. 559.

Here the legal interest is unquestionably joint; but the fourth; fifth and sixth breaches assigned set out an injury and cause of action accruing to Miller alone, in respect to which his co-obligee has no legal interest, and neither of which is within the words, import or effect of the condition. "When the *legal interest* and cause of action of the covenantees are *several*, each may and *should* sue separately for the particular damages resulting to him individually, although the covenant be, in its terms, joint. And it is improper, as well in *equity* as at *law*, for a party to be joined in a suit who has neither legal nor beneficial interest in the subject matter. Thus, if A, by indenture, demise Blackacre to B and Whiteacre to C, and covenant with them and each of them (or it seems if he covenant with them in express terms jointly) that he is the owner of the closes, each should sue separately in respect of his distinct interest, and they can not jointly sue, for they have no joint or entire interest in same subject matter." 1 Chit. Pl. 10.

It follows, from the principle of these rules of the common law, that, in an action by two obligees upon a bond for the performance of covenants, wherein the legal interest of the obligees is joint, a count, or assignment of breaches, for particular damages resulting to one of the plaintiffs individually, is bad in substance; and where some of the assignments of breaches are for damages resulting to both plaintiffs, one for damages sustained by one plaintiff, and another for damages sustained by the other, as to which his co-plaintiff has no interest, there is a misjoinder of counts, and if entire damages be given upon all the counts, the judgment will be reversed upon error. 1 Chit. Pl. 205, 411.



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The assignment of breach, to which the fourth plea was pleaded, being for damages resulting to one plaintiff individually, was, therefore, bad in substance, and it was error to sustain the demurrer to that plea. The sixth, seventh and eighth additional pleas, to which demurrer was sustained, were pleaded respectively to assignments of breaches, for particular damages resulting to Miller alone, and which were also bad in substance. The demurrer was improperly sustained to those pleas, for the same reason.

The true state of the case is simply this: The first assignment of breaches is for damages resulting to both obligees, the second for damages to Miller alone, the third to Cheek alone, the fourth, fifth and sixth to Miller alone, the seventh to both obligees. Hence, the assessment of damages, in order to correspond, must be in three distinct forms: First, to both plaintiffs; second, to Cheek alone; third, to Miller alone. Not only separate assessments, which may be allowable in some cases, but separate assessments in different rights in the same cause, and that an action *ex contractu*. But here, without a *nolle prosequi* as to the counts for individual damages, the court assessed entire damages upon all the counts, and gave judgment. This was manifestly erroneous. It may have been supposed that, because the action was brought in the name of both obligees, for the use of Miller, it would not fall within the general rule; but such is not the law. The bond was not assignable at law, and courts of law, so far as the rules as to the parties and procedure are concerned, take no notice of mere equitable interests.

We shall not consider the sufficiency of the other pleas, because they must be regarded as sufficient for a declaration bad in substance.

The judgment of the court below is reversed, the cause remanded, and a repleader awarded.

*Judgment reversed.*

THOMAS E. MERRITT *et al.*

v.

WILLIAM B. EAGAN.

TRESPASS by an officer, in the execution of process—of the rights of privies to the judgment. A person who was a silent partner of the plaintiff in an action of replevin, in respect to the goods involved in the suit, purchased his co-partner's interest therein pending the suit, and took the property into his own possession. The action of replevin was dismissed without a trial upon the merits, and a writ of *retorno habendo* awarded, which was placed in the hands of an officer, who went upon the premises of the party who had thus obtained the possession of the goods, and seized them under the writ: *Held*, the person from whom the goods were taken under the writ of *retorno habendo*, in either capacity—as a partner of the plaintiff in replevin, or as his vendee pending that suit—was a privy to the judgment awarding the writ of *retorno*, and was estopped from asserting his title as against the right of the officer to execute the writ. The officer was not a trespasser in making return of the property.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action of trespass brought in the court below, by William B. Eagan, against Thomas E. Merritt, Samuel R. Carrigan, William R. Hubbard and Charles G. Pearson.

The alleged cause of action, as appears from the declaration, was the breaking and entering the store house of the plaintiff, with force, by the defendants, and taking and carrying away therefrom certain goods and chattels, the property of the plaintiff.

The transaction out of which the suit arose, was as follows:

Charles Munger commenced an action of replevin against Charles Dodd and Foster Sutton, in respect to the same property mentioned, which was taken under the writ and placed in the possession of Munger. The action of replevin was dismissed by the plaintiff without a trial on the merits, and a writ of *retorno habendo* was awarded. Eagan, the plaintiff in

this action of trespass, was a silent partner of Munger in the property, and pending the suit in replevin he purchased from Munger his interest therein, and the property was delivered into the possession of Eagan.

The writ of *retorno habendo* was placed in the hands of the defendant Carrigan, as deputy sheriff, who, with his co-defendants as his assistants, went upon the premises of Eagan and seized the property under the writ, and in this consists the alleged trespass.

A trial resulted in a finding and judgment in favor of the plaintiff for the full value of the property.

The defendants appealed:

Mr. B. B. SMITH, for the appellants.

Mr. HENRY C. GOODNOW and Mr. W. W. WILLARD, for the appellee.

Per CURIAM: The evidence shows, that appellee was a silent partner of Munger, and was interested in the claim out of which an action of replevin originated, in which Munger was plaintiff and Dodd and Sutton were defendants, and which was dismissed, and a judgment *retorno habendo* was rendered against Munger. Appellee also purchased of Munger his interest in the property whilst the replevin suit was pending. And the property was seized by the sheriff and his *posse* by virtue of a writ issued under the judgment of *retorno habendo*. Appellee is estopped to claim the property as against this writ, as the partner of Munger, and as his vendee before its return was adjudged. In either relation he was a privy to the judgment, and is estopped from denying appellants' right to execute the writ. Munger could not have recovered for trespass in executing the writ, and appellee, from his relation to the transaction, can have no higher or better right than Munger had, unless it should be simply for entering his premises, as he was not named in the writ, but such an entry could not entitle him to more than nominal damages, unless more

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force and violence were used than was necessary. See *Lear v. Montross*, 50 Ill. 507.

Appellee could not show title in himself, so as to render the return of the property under the writ, a trespass. His partner and vendor having obtained the property by replevin, and on the dismissal of the suit a judgment for the return of the property having been rendered against him, he, or his privies, could not resist or evade its return, by claiming to own the property. After its return he might, no doubt, assert title, as though no judgment had ever been rendered. Or, even before a return, he might have instituted proceedings at law for the purpose of establishing his ownership. But he must submit to have the writ executed, and can not treat the officer as a trespasser, simply because he executes the writ, by restoring the property to the person to whom the court had adjudged it should be returned. But if the officer breaks and enters the close of the person who is the owner of the property, and against whom there is no writ, then the officer is liable for that act as a trespass. The jury, in this case, rendered a verdict for the full value of the property returned, and in this there was error, as there was no trespass in taking it under the writ. The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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WILLIAM LAMMERS

v.

DETRICK R. MEYER.

1. PLEADING—*of a plea of justification in replevin.* In an action of replevin, a plea of justification, that the defendant took the property by virtue of an execution directed to him as sheriff, averred "that at the time when, etc., to wit, on the 22d day of August, 1870, he was sheriff," etc., "and on the 24th day of May, 1870, at said county, an execution came into

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his hands, as such sheriff, issued by the clerk," etc., "dated the 24th day of May, 1870, on a judgment in said court, rendered on the 14th day of April, 1870," "which said judgment was then and there in full force and effect," "directed to this defendant, as such sheriff, to execute, and that by virtue of said execution this defendant, as such sheriff, did, on the 22d day of August, 1870, and in the lifetime of said execution, take said goods," etc. On objection that the plea did not show the execution was in full force at the time of the levy, it was *held*, according to a reasonable construction the plea showed that the judgment, and of course the execution issued thereon, were in full force and unsatisfied on the 24th day of May, 1870, and that the levy was in the lifetime of the execution. This was equivalent to an averment that the execution was in full force at the time of the levy.

2. In such a plea, no allegation was necessary as to the date of the judgment, and it might be rejected as surplusage, and need not be proved. Its rejection would not alter the general sense or effect of the plea.

3. *SAME—of the certainty required in a plea.* A plea is not objectionable on account of obscurity or ambiguity, if it be certain to a *common intent*. It need only be clear enough according to reasonable intendment and construction. The rule is, that the natural sense must prevail.

4. *SAME—words of reference*, as "there" and "said," even in an indictment, will not be referred to the last antecedent, if the sense requires that they should be referred to some prior antecedent.

5. *SAME—of a plea purporting to answer the whole declaration, but does not.* In an action of replevin, in which the declaration contained a count for the taking, and also one for detaining, the property, a special plea purported to answer the entire cause of action,—it avowed the taking of the property under an execution, and averred that it was the property of the execution debtor, and not of the plaintiff. This was regarded as presenting a complete bar to the cause of action, and the plea was not obnoxious to the objection that it professed in the commencement to answer the whole declaration, and only answered the first count, for the taking.

6. *JUDGMENT IN REPLEVIN—its requisites.* A judgment in replevin, awarding a writ of *retorno habendo*, will not be regarded as too general in the description of the property, if it follow the declaration in that regard.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an action of replevin, brought in the court below by William Lammers, against Detrick R. Meyer, to recover certain property described in the declaration as "all the dry goods, groceries, hardware, queensware, notions, etc., being in

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Statement of the case. Opinion of the Court.

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the store house of William Lammers, in the town of Bridgeport, Washington county, Illinois," of the value of \$450.

Final judgment was rendered in favor of the defendant upon the overruling of demurrers to the several pleas filed, which are sufficiently set forth in the opinion of the court.

Messrs. WINKELMAN, WATTS & WARES, for the appellant.

Mr. ISAAC MILLER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Pleas of justification were filed by defendant below, that he took the property by virtue of an execution, directed to him as sheriff.

The court overruled demurrers to these pleas, and this is assigned for error.

It is urged that they are defective, in not averring that the execution was in full force, and the money due thereon unpaid, at the time of the levy.

The portion of the pleas to which objection is made, is as follows: "Said defendant says *actio non*, because, he says, that at the time when, etc., to wit, on the 22d day of August, 1870, he was sheriff of Washington county, and on the 24th day of May, 1870, at said county, an execution came into his hands, as such sheriff, issued by the clerk of the circuit court of said county, dated the 24th day of May, 1870, on a judgment in said court, rendered on the 14th day of April, 1870, in a suit wherein one Isaac Miller, assignee, etc., was plaintiff, and one Julius Klosterman was defendant, for the sum of \$416.89 damages, and costs of suit, which said judgment was then and there in full force and effect, and the money due thereon unpaid, directed to this defendant, as such sheriff, to execute, and that by virtue of said execution, this defendant, as such sheriff, did, on the 22d day of August, 1870, and in the lifetime of said execution, take said goods, etc."

A plea is not objectionable on account of obscurity or ambiguity, if it be certain to a *common intent*. It need only be

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clear enough according to reasonable intendment and construction. The rule is, that the natural sense must prevail. 1 Chit. Plead. 233; Steph. Plead. 379.

We must read and understand the plea, by giving to it a natural, and not a forced and artificial, meaning. The averment that the judgment was then and there in full force, should be referred to the date of the execution. This was evidently the meaning of the plea.

Chitty lays down the rule, that words of reference, as "there" and "said," even in an indictment, will not be referred to the last antecedent, if the sense requires that they should be referred to some prior antecedent. 1 Chit. Plead. 239.

In this case, the sense requires that the word "there" in the plea should relate to the date of the execution, and not to the date of the judgment; for the latter was necessarily in force on the day of its rendition, and might not have been after the lapse of more than a month.

Again, it is a maxim that *utile per inutile non vitiatur*. No allegation was necessary as to the date of the judgment, and it may be rejected as surplusage, and need not be proved. Its rejection would not alter the general sense or effect of the plea. 1 Chit. Plead. 229; Steph. Plead. 378.

According to a reasonable construction, then, the plea shows that the judgment, and of course the execution issued thereon in proper form, were in full force and unsatisfied, on the 24th day of May, 1870, and that the levy was made in the lifetime, and by virtue, of the execution. This is equivalent to an averment that the execution was in full force, and the money due thereon unpaid, at the time of the levy. An execution satisfied and discharged has no vitality; its virtue has departed; and we can not indulge the unreasonable presumption that the sheriff seized the property by force of an execution which had been paid.

It is also contended that, as there is a count in the declaration for the taking, and one for detaining, the property, the

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special pleas are obnoxious to the demurrer, because they profess, in the commencement, to answer the whole declaration, and afterwards only answered the first count, for the taking.

We think the pleas go further than supposed. They purport to answer the entire cause of action, and do so effectually. It is true, that the taking by virtue of the execution is avowed, but, then, they set up matter and conclude in bar of any right of recovery by the plaintiff. It is positively averred, that the property was the property of the execution debtor, and not of the plaintiff, in the conclusion of both of the pleas. This is a complete bar to the cause of action, and we think the fifth plea is a good plea of estoppel. We are, therefore, of the opinion that the demurrers were properly overruled.

The objection, that the judgment is too general, is not well taken. It describes the property, as appellant has done, both in his declaration and in his bond to the sheriff, as set out in the fifth plea. The court must order a return of the property, as claimed in the declaration. This has been done; and if appellant suffer thereby, he alone is responsible for the mischief. The description is his own handiwork.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

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MARSHALL A. DENNING *et al.*

v.

CALVIN M. CLARK.

1. PARTITION—*order of sale—when may be made.* In a suit for partition it is an essential requirement of the statute, that, preceding the order of sale, the court shall declare the interests of the parties, order a partition of the premises, and appoint commissioners to make the division.

2. Such preliminary orders, to the order of sale, can not be made after the sale has taken place, so as to support it.



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WRIT OF ERROR to the Circuit Court of Franklin county ;  
the Hon. A. D. DUFF, Judge, presiding.

Mr. EDWARD V. PIERCE and Mr. THOMAS J. LAYMAN, for  
the plaintiffs in error.

Messrs. YOUNGBLOOD & BARR, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The order of sale, and the sale itself, of the premises involved in this suit for partition, were unauthorized, as having been made before there was any order, either of partition or ascertaining and declaring the rights and interests of the parties, or of the appointment of commissioners to make partition.

The order of sale was made at the August term, 1865, directing the sale to be made on the last Saturday of the following October, at which time it was made. The only proceedings had before the court, previously, were the appointment of a guardian *ad litem* for the minor heirs, a rule upon him to answer, the filing and approving his answer, a reference to a special master to take proofs and report, and a report purporting to be of commissioners, that the lands were not susceptible of division, whereupon followed the order of sale. It is conceded, on the part of counsel for the defendant in error, that this order was defective, but it is claimed to have been cured by what took place at the following March term of the court.

At that term, the petitioner moved the court, that a proper decree in the case be made up in accordance with the prayer of the bill and the minutes of the last term, whereupon it was ordered by the court, that the clerk enter up a decree in the case, making the same conform to the petition in the cause, and the minutes of the last term in the same, and that the same be written up now for then ; and a regular decree was then entered as of the preceding August term, declaring the interests of the parties, ordering partition, and appointing commissioners to make it. But this does not appear to have

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Opinion of the Court.

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been an amendment of any decree of the August term, in these respects, but a decree for the first time, in respect to those matters.

All of the minutes made by the judge, in his docket, purport to be copied into the record, and they supply nothing which was wanting in the record of the orders of the court previous to said March term. Such record was correctly made up from the minutes, and embraced fully every matter to which they pertain. Neither the record nor minutes previous to said March term furnish any indication of any action whatever, of the court, upon the subject of the above mentioned matters previous to the sale. But these were essential requirements of the statute before any order of sale could be made, to-wit: finding the interests of the parties, that partition should be made, and the appointment of commissioners to make division. *McLain et al. v. Van Winkle et al.* 46 Ill. 407.

On the same day of the March term that said decree was made, the special master made report of the sale, which he had made in October preceding, and it was approved by the court.

Such a practice is not to be tolerated. Essential preliminary orders to the order of sale, must precede the sale, and will not be allowed to be made after it has taken place, so as to uphold it.

In *Sullivan v. Sullivan*, 42 Ill. 316, a decree for the sale of the premises in a case of partition was reversed, because the oath of the commissioners, and their report, bore date three days previous to the decree by which they were appointed, although their report was approved by the court. It was there said, a court should not approve and adopt such acts; that the statute required the appointment of the commissioners before they could act, and that its commands must be obeyed.

The orders for the sale of the lands, and confirming their sale, were erroneous.

Numerous other errors are assigned, which we will not review in detail, as an opportunity will be afforded to obviate them in the course of the further proceedings in the cause.

Leave will be given to amend the petition, so as to set out the title of the petitioner, and verify it by affidavit as required by the statute.

The orders for the sale of the lands, and confirming the sale, are reversed, and the cause is remanded.

*Judgment reversed.*

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SMITH & McCORD

v.

ZEBEDEE P. CURLEE.

1. COUNT ON AN ACCOUNT STATED—*what will support it—waiver of laches of holder of bill of exchange.* After a bill of exchange had been refused payment by the drawee, in an interview between the holder and the drawer, the latter admitted the claim to be just, and the amount due on the bill was computed and agreed to by the drawer, and he promised to pay it by a day named, or send the holder a note for it. It was held that evidence of these facts would justify a recovery under a count on an account stated, and that it amounted to a waiver of any laches with regard to the bill, had there been any.

2. PROTEST—*inland bill.* An inland bill of exchange is not required to be protested.

APPEAL from the County Court of Bond county; the Hon. E. GASKINS, Judge, presiding.

This was an action of assumpsit, brought in the court below, by Zebedee P. Curlee, against Henry H. Smith and George C. McCord.

The declaration contained a special count upon a bill of exchange, of which the defendants were the drawers, also the common counts, and one on an account stated.

The plaintiff recovered a judgment, from which the defendants appealed.

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Opinion of the Court.

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Mr. S. P. MOORE, for the appellants.

Messrs. S. A. & A. C. PHELPS, for the appellee.

Per CURIAM: It is unnecessary to consider, in this case, the questions which have been raised, as to a variance between the bill of exchange sued on and the special count in the declaration, or as to due diligence in regard to the bill.

The declaration contains the common counts, and one on an account stated.

The testimony shows, that after the bill had been refused payment by the drawees, an interview took place between the plaintiff and both the defendants, whereat the latter admitted the claim to be just, and the amount due on the bill was calculated, including interest and cost of protest, and found to be \$212.40; that the defendants agreed to that amount, and promised to pay it by a named day or send the plaintiff a note for it. This evidence justified a recovery under the count on an account stated. It amounted to a waiver of any laches with regard to the bill, had there been any such. The promise was made with full knowledge of the facts. The protest showed when payment had been demanded, and the defendants knew when they received notice of non-payment.

It does not help the defendant's case, that this interview took place January 1, 1870, as testified to by the witness, evidently by mistake, as the protest was after that time, February 23, 1870. The date of the bill being December 22, 1869, if the interview was January 1, 1870, it would only go to show greater, and so far as appears from the evidence, due diligence.

Being an inland bill of exchange, it was not required to be protested, Story on Bills, sec. 281, and no matter if there had been no protest when the promise to pay was made.

The finding of the court was sustained by the evidence, and the judgment must be affirmed.

*Judgment affirmed.*

WILLIAM THOMAS, Trustee, etc.,

v.

WILLIAM ADAMS *et al.*

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| 50  | 223 |
| 138 | 191 |
| 50  | 223 |
| 44a | 330 |
| 45a | 213 |

1. *CHANCERY*—*when the allegations of the bill must be supported by proof.* Where the answers to a bill in chancery deny the allegations in the bill, or do not admit them to be true, the complainant is put upon proof of them, and where the record does not contain any evidence, and the decree fails to recite that the hearing was upon evidence, the action of the court below, dismissing the bill, will be sustained in the appellate court.

2. *SAME*—*proof required as to infants.* A default can not be taken against infant defendants in chancery, nor can a decree be rendered against them without proof.

3. *SAME*—*agreement as to proof on a former hearing.* An agreement as to what the exhibits in a cause proved on the hearing, will not operate as evidence on a hearing subsequently had, upon a reversal of the first decree; and if such agreement could be given any effect upon a second hearing, as to parties in court at the time it was made, it could not bind new parties to the record who gave no assent thereto.

WRIT OF ERROR to the Circuit Court of Crawford county.

Mr. WILLIAM THOMAS, *pro se.*

Mr. JAMES C. ALLEN, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The bill in this case was filed to subject real estate, devised by Josiah R. Wynn to his wife and children, to the payment of a number of judgments of many years' standing, and to which Wynn was a party defendant, and which were recovered by the Bank of Illinois. The case was previously before this court, and is reported in 30 Ill. 37, when it was remanded for the purpose of making additional parties and for further proceedings. It was then held, that the bill contained equity apparent on its face. The bill was subsequently amended and a hearing had, and a decree rendered dismissing

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Opinion of the Court.

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the bill. The cause is now brought to this court on error and a reversal is asked, because the relief sought was not granted.

After a careful examination of the transcript, we fail to find any evidence in support of the allegations of the bill. We find that on the first hearing, before the case was previously brought to this court, copies of the judgments were read in evidence. But on this latter trial the record fails to show that any evidence was heard. The recital in the transcript is, that "This cause having been submitted to the court at its last term, and continued under advisement, and the court being now sufficiently advised and satisfied in the premises, it is ordered and decreed that the prayer of the said complainants' bill of complaint be denied and that said bill be dismissed," etc. Thus it is seen, that it fails to appear that the hearing was upon any evidence. It does not even appear that the exhibits were read. For aught that appears it may have been on bill and answers. And the answer of the minor defendants denies all the allegations of the bill. This required complainant to prove every material allegation against them, and hence the decree as to them is correct. They could not be defaulted nor relief granted as to them without proof.

Nor was there any proof to overcome the answers of the adult defendants. They do not admit the allegations of the bill. The agreement as to what the exhibits proved, on the previous trial, did not operate as evidence on this latter hearing, and if it could have such an effect as to the parties then defendant, it could not bind new parties to the record, who gave no assent to that agreement. But beyond all this, the exhibits do not seem to have been read on the hearing below. If, on the evidence before the Chancellor, complainant believed the decree was erroneous, he should have had it embodied in a certificate, signed by the judge who tried the case. We must, in the absence of proof, presume, that the court below decided correctly in dismissing the bill. Nor was it the duty of the defendants to preserve complainants' evidence.

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Syllabus. Statement of the case.

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It may be that proof was heard on the trial, but it does not appear in the transcript. We fail to find any error in the record, and the decree of the court below is, therefore, affirmed.

*Decree affirmed.*

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JOHN HERMANN

v.

SETH BUTLER.

1. *CERTIORARI—when it will lie.* Where a party had been duly served with summons in a cause pending against him in the city court of East St. Louis, the mere fact that the plaintiff's name was written Bulter in the summons, instead of Butler, as it was upon the docket, was held not to be a sufficient excuse for his failure to appear and defend the suit, nor would it afford sufficient ground for the statutory writ of certiorari to remove the cause into the circuit court.

2. In such case the party sued, knowing there was a suit against him, should have appeared, and if the plaintiff's name was wrong in the summons he should have pleaded in abatement. He could not neglect his proper defense, and then have his writ of certiorari.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

A writ of certiorari was issued, under the statute, upon the following petition:

"John Hermann, the petitioner, represents that on the 2d day of November, 1870, Joseph D. Manners, judge of the city court of East St. Louis, in said county, issued a summons against petitioner, in favor of one Seth Butler, for a failure to pay him a demand not exceeding \$800; that said summons was served upon him by the proper officer, commanding him to appear before said judge on the 7th of November, 1870, at 9 o'clock A. M.; that defendant did appear and asked said

15—59TH ILL.

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Statement of the case.

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Judge Manners if the case of *Seth Butler v. John Hermann* was ready for trial, when the said judge informed petitioner that there was no such case on his docket nor before the court. Petitioner, and his attorney, John B. Bowman, further examined said docket, and, after satisfying themselves that there was really no case against him, then left the court; that afterwards, to wit: on said 7th day of November, 1870, said Joseph D. Manners rendered a judgment against petitioner and in favor of one Seth Butler, for the sum of \$125, and costs, taxed at \$7.30; that on the 29th day of November, 1870, Timothy Canty, the executive officer of said city court, came to petitioner and levied upon some personal property by virtue of an execution issued in said case, and this, petitioner states, was the first notice he had of the pendency of any suit, or the rendition of any judgment, against him in said court, and particularly in favor of said Seth Butler.

“Petitioner represents that if he had had a chance to defend said suit on the trial, he could have proven that he was in nowise indebted to said Seth Butler, on any account whatever, and that he could have proven that the mare, on account of the loss of which he is informed he is sued by said Butler, was lost by said Butler himself while in his own charge, and that said judgment is wholly unjust and erroneous.

“Petitioner represents that he has had no chance to appeal in the ordinary way, because the first notice he had of the suit, as shown before, was twenty-seven days after said judgment; that this application is not made for delay, but that justice may be done to petitioner in the premises.

“Petitioner, therefore, prays that a writ of certiorari may issue in this cause, in pursuance of the statute in such case made and provided.”

The writ of certiorari was afterwards, upon motion, quashed, and the petitioner thereupon appealed.

Mr. JOHN B. BOWMAN and Mr. LUKE H. HITE, for the appellants.



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Syllabus. Statement of the case.

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Mr. WILLIAM G. KASE and Mr. GEORGE W. BRACKETT, for the appellee.

Per CURIAM: Appellant filed a petition in the court below, for a writ of certiorari, which was issued.

The writ was properly quashed. It appears from the petition that appellant knew that there was a suit pending against him in the city court. He had been summoned.

What difference did it make whether the plaintiff's name was "Bulter" or "Butler?" If the plaintiff's name was wrong, a plea in abatement should have been interposed. Whether right or wrong, appellant should have appeared and made his defence.

The judgment, if improper, was clearly the result of negligence on the part of appellant. He was not entitled to the writ under the circumstances, and the judgment of the circuit court must be affirmed.

*Judgment affirmed.*

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JOHN H. MCBRIDE

v.

MARY P. GRIFFIN.

*EVIDENCE—of communications between parties.* In an action to recover for the board of the defendant and his hired hands, it is competent for the defendant to prove a communication from him to the plaintiff, in respect to the board of such of his hands as might fail to work for him.

APPEAL from the Circuit Court of Clay county; the Hon. R. S. CANBY, Judge, presiding.

This was an action of assumpsit, brought by Mary P. Griffin against John H. McBride.

The action was brought upon an account for the board of the defendant, and his hired hands who were working upon a

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Statement of the case. Opinion of the Court.

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bridge which the defendant was engaged in building. On the trial the defendant called a witness named Rughti, who was his foreman on the work during the absence of the defendant, and asked him to state a communication he made to the plaintiff from the defendant, respecting those persons who failed to work for a day or two, or longer, for the defendant. On the objection of the plaintiff, the court ruled that the question should not be answered, and the defendant excepted.

The trial resulting in a judgment in favor of the plaintiff, the defendant appealed.

Mr. G. W. HENRY, for the appellant.

Mr. W. STOKER, for the appellee.

Per CURIAM: A judgment was rendered against appellant, below, for \$124.19.

According to the testimony of appellee, unchanged by any other evidence in her favor, her account was \$332.65; and the payment made to her amounted to \$223.26. The largest amount for which judgment could have been rendered, was \$108.69. The judgment is therefore erroneous.

There was also error in refusing to hear the communication, from appellant to appellee, through the foreman of the former, in relation to the board of certain persons, who might fail to work for appellant.

The communication and reply might not have been material, but the relevancy could not be determined without the admission of the evidence.

The controversy was in regard to the board of certain persons. If the communication elicited a reply, it was proper that the jury should have heard both, and considered them, under the instructions of the court.

The judgment must be reversed and the cause remanded.

*Judgment reversed.*

## GARVIN, BELL &amp; Co.

v.

## ROBERT STEWART'S HEIRS.

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| 59  | 229 |
| 67a | 51  |
| 59  | 229 |
| 169 | 138 |

1. CREDITOR'S BILL—*whether it will lie against the heirs of a deceased debtor.* While there are cases, where there are complicated equities, which might authorize a court of equity to entertain a creditor's bill against the heirs of a deceased debtor, to subject the real estate descended to them to the satisfaction of the debt, and to adjust the equities between the several creditors, yet, ordinarily, creditors of an estate will be remitted to the remedy provided by statute for the settlement and distribution of estates, through the agency of the administrator.

2. In this case a creditor had obtained a judgment at law against a surviving partner, and thereupon filed his bill in chancery against the heirs of the deceased partner, to subject real estate which had descended to them, to the payment of the debt, alleging the insolvency of the surviving partner, and that there was no administrator of the estate. The bill did not disclose whether there were any other creditors. It was *held*, the facts were simple, and there was no reason existing for taking the case out of the ordinary course of administration provided by the statute, and a court of chancery ought not to entertain the bill.

3. The fact that the claim may be of an equitable character, will not avail, of itself, to render it proper for a court of chancery to assume jurisdiction, because the probate court, in the matter of the settlement of estates, may take cognizance of equitable claims as well as those which are purely legal in their character.

4. SAME—*of the requisites of the bill—character of creditor's lien on real estate of deceased debtor.* In a case where the equitable circumstances are such that a court of equity might properly entertain a creditor's bill against the heirs of a deceased debtor, the bill should show there are no personal assets to which resort could be had, because the creditor's lien upon the real estate is only secondary, and depends upon the non-existence of personal assets, and the rule which controls an administrator in that regard, applies as well to a creditor who seeks his remedy in chancery.

~ WRIT OF ERROR to the Circuit Court of Pope county;  
the Hon. JOHN OLNEY, Judge, presiding.

Mr. JAMES M. WARREN, for the plaintiffs in error.

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Opinion of the Court.

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Mr. JUSTICE WALKER delivered the opinion of the Court :

It appears from the record in this case, that on the 15th day of June, 1863, plaintiffs in error filed a bill in chancery, against A. V. Hight and defendants in error. The bill alleges that on the 30th day of June, 1860, Hight and Robert Stewart, by the style of Hight & Stewart, were indebted to complainants in the sum of \$662.47, for which they executed their note, due one day after date, and payable to complainants; that afterwards, on the 10th day of April, 1861, Stewart departed this life, and at the April term, 1863, of the Pope circuit court, complainants obtained a judgment against Hight, as surviving partner of the firm of Hight & Stewart, for the sum of \$834.68, the amount of the note and interest; that Hight was insolvent and the judgment was unavailing; that Stewart, at the time of his death, was seized of certain lands described in the bill, and that he left appellees as his heirs at law surviving him; that no administration had been granted on his estate.

At the August term, 1863, a demurrer was filed to this bill, and complainants thereupon, upon leave of the court, amended by changing it to a creditor's bill, and that Hight had departed this life since filing the original bill, and that his estate was insolvent. At the March term, 1868, complainants again amended their bill, to obviate the answer which set up that the note was executed by Hight, after the firm had been dissolved by Stewart's death.

The amended bill charges, if Stewart was dead when the note was executed, complainants were not cognizant of the fact; that Hight was the active partner, and purchased all the goods for the firm; that the note was executed by Hight and accepted by them; that the consideration for which the note was given was goods, wares, and merchandise, sold and delivered to Hight and Stewart, between the first day of April and the 12th day of October, 1859; that the amount of goods sold to them between those dates was \$3340.06, and the

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Opinion of the Court.

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amount paid thereon was \$2449.99, leaving a balance due on the 6th of December, 1859, of \$890.07, at which time there was paid \$250, leaving the balance due of \$662.47, for which the note was given. And claims, that if Stewart was dead when the note was given, the execution of the note by Hight did not release Stewart's estate from liability to pay the debt, as it remained due and unpaid.

At the May term, 1868, defendants in error filed a demurrer, which the court sustained, and dismissed the bill. And the record is brought to this court and we are asked to reverse that decree.

Defendants in error having failed to file a brief in the case, it was submitted by plaintiffs in error on their abstract and brief. The first question presented by this record is, whether, from the facts charged in the bill, it appears that plaintiffs in error have a lien on the real estate of which Stewart died seized. In the case of *Vansyckle v. Richardson*, 13 Ill. 171, it was held, that under our statute, the lands of an intestate are held subject to the payment of his debts. After the personal estate has been applied for that purpose, it is made the duty of the administrator to apply to the proper court and obtain a license to sell such portion of the real estate as will discharge the residue of the debts. It was, however, said, the lien was not perpetual, but might be lost by gross laches or unreasonable delay; that the real estate descends to the heir with this charge resting upon it.

Again, in the case of *McCoy v. Morrow*, 18 Ill. 519, the doctrine was fully recognized and applied to that case. But owing to the delay in enforcing the lien it was held to be lost, and the creditor barred from its assertion. The same rule has been recognized in subsequent cases. So that it may be regarded as the settled law of this court. Being a lien that attaches to and attends the land until lost, whether in the hands of the heir or his grantee, it may be enforced by an application of the administrator to the proper court for license to sell it, and apply the proceeds to the payment of the debts

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Opinion of the Court.

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of decedent. This the statute has authorized to be done, and thus render the lien productive.

The question then arises whether the same end may be attained by a creditor's bill in equity. Equity has always exercised jurisdiction to enforce liens which attach to real property, in favor of creditors, and the bill filed for that purpose, which has long been in use, has come to be known in practice as a creditor's bill. It appears that in the case of *Vansyckle v. Richardson, supra*, a part of the creditors filed a bill against the heir, the trustee to whom he, as surviving partner, had conveyed the real estate for the use of another portion of the creditors, and a number of purchasers under execution against the surviving partner, who was also the heir, and to whom the real estate of his deceased partners had descended. The court entertained jurisdiction and decreed the relief sought. In that case the complication of rights which had intervened were sufficient to have authorized the court to take jurisdiction, for the purpose of settling the equities of all the parties, and thus prevent a multiplicity of suits at law, and it seems no question of the jurisdiction was raised, and the court heard the cause and enforced the lien.

In this case, however, there is no traversable allegation that there are no assets or personal property, out of which the debt could be made by administration. The creditor's lien is only a secondary one, depending upon whether there are personal assets. It is not until they are exhausted that the administrator is authorized to apply for leave to sell real estate for the payment of debts. This is the condition upon which he is authorized to act, and the creditor could not be placed in a better position than the administrator. If there are assets, the law has appropriated them to the payment of this and all other debts the testator may have owed, and they should be exhausted by administration before the lien on real estate could be made available.

Again, there is no positive and traversable allegation that there are no other creditors of Stewart's estate. If there are,

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Opinion of the Court.

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then plaintiffs in error have no superior claim or lien to theirs. And in case there are other creditors, to entertain this bill would be to transfer the settlement and administration of the estate to a court of equity, whilst the statute has designated another tribunal and prescribed a different mode for the settlement and distribution of estates, more expeditious and less expensive than in a court of chancery.

There are, however, cases, where there are complicated equities, which might authorize a court of equity to entertain jurisdiction, and having done so, it would retain the case and do complete equity to the parties. But in this case the facts are simple, and we can see no reason for taking the case out of the usual course of administration. If letters of administration should be granted, no reason is perceived why the claim of plaintiffs in error should not be allowed against Stewart's estate, if just and subsisting, or that would prevent the administrator from applying for an order for the sale of this land. Although equitable, the claim is cognizable in the probate court. *Moore v. Rogers*, 19 Ill. 348.

The allegations in this bill were not sufficient to give the court jurisdiction, and the decree of the court below must be affirmed.

*Decree affirmed.*

Subsequently, upon a rehearing of the cause, the following additional opinion was filed:

Per CURIAM: A rehearing having been allowed in this case, we have carefully re-examined the case, and the opinion of the court as prepared by Mr. Justice WALKER. We are fully satisfied with the former decision of the case, and with the grounds upon which the opinion is based as well as the reasons urged in their support. The decree of the court below must, therefore, be affirmed.

*Decree affirmed.*

EDWARD C. MILLS

v.

JOSIAH F. WOOTERS.

*TRESPASS—for taking personal property—whether it will lie.* In an action of trespass for the forcible taking of a cow, it appeared the plaintiff had sold the cow, and the defendant purchased the animal from his vendee, and at the time of the taking she was in the possession of a third party, and the plaintiff told the defendant he had sold her, and that he might take her: *Held*, there was no trespass, although the defendant, in taking his property, used such violence as amounted to a breach of the peace.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. JOHN B. KAGY and Mr. B. B. SMITH, for the appellant.

Messrs. CASEY & DWIGHT, for the appellee.

— *Per CURIAM*: Appellant brought an action of trespass, for the forcible taking of a cow.

The facts are, briefly: that the cow, at the time of the alleged taking, was in the possession of a third party; that appellant had sold her to one Oliver for \$35, and had received in payment \$29, and that appellee had purchased her of Oliver and paid for her, and in a conversation between the parties, appellant said, he had sold her to Oliver, and that appellee might take her.

It is contended, in argument, that the alleged trespass was an outrageous invasion of the rights of the citizen. The language of appellee, at the time he took the cow, was reprehensible. He, and those with him, may have been guilty of a riot. A breach of the peace may have been committed.

All this would not constitute trespass in the taking of the property. Consent was given for that, and then the payment was made to Oliver. The property then belonged to appellee. He was the owner, and had the right to use sufficient force to



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Syllabus.

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obtain possession. He was not, however, justified in committing an assault, or a breach of the peace.

After the agreement between the parties it would be manifestly unjust, and in violation of every principle of law and right, to permit appellant to retain the cow. He must abide by his promise fairly made.

The judgment must be affirmed.

*Judgment affirmed.*

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THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD  
COMPANY

v.

MICHAEL MOLLET.

1. ASSESSMENT OF DAMAGES *for right of way for a railroad—what are proper subjects therefor.* All injuries which are appreciable, and which result to the owner of land from the construction of a railroad over the same, are legitimate subjects in the estimation of damages, in a proceeding for condemning the right of way.

2. If fruit trees, which are upon the land taken, were not included in the damages for the land itself, they may properly be the subject of a separate assessment. The mode of assessment is immaterial, so that the damages are assessed fairly and truly.

3. So, where ditching the adjacent land becomes necessary by reason of embankments thrown up for the road, the expense thereof is a proper element to be considered in assessing the damages.

4. But cattle guards are not proper subjects for such an assessment, because they could enter into the estimate only on the hypothesis that the proprietor of the land may construct them, which he would have no right to do, except by permission of the company.

APPEAL from the Circuit Court of Monroe county; the  
Hon. SILAS L. BRYAN, Judge, presiding.

This was a proceeding by the railroad company to condemn the right of way for its road over the land of Mollet. Damages were assessed, and a judgment rendered therefor, from which the company appealed.

Mr. JOHN SCHOLFIELD, for the appellants.

Messrs. HAY & KNISPEL, for the appellee.

Per CURIAM: As the judgment must be reversed, we shall not discuss the sufficiency of the evidence as to the title of the claimant to the land proposed to be condemned, nor the excessive character of the damages, as claimed. The deficiency, if it exist, can be supplied by proof; and as to the other, we shall not forestall the action of the jury, upon another trial.

It is, however, contended that the apple trees, the ditching and the cattle guards were not proper subjects for the assessment of damages.

If the apple trees destroyed, and the expense for ditching, or either of them, were included in the general estimate for damages to the land, then there should be no separate assessment, as to them. The trees were upon the land taken for the right of way, and their use destroyed, according to the evidence. If they were not included in the damages for the land taken, they might properly be the subject of a separate assessment.

The mode of assessment is wholly immaterial, so that the damages are assessed fairly and truly.

It is true, that railroad companies are under no obligation to ditch land over which the road runs, but the necessity and expense of ditching can be determined in this proceeding as well as afterwards.

The assessment of damages for ditching, in this case, does not necessarily anticipate an injury. The road had been constructed, the embankments made, and persons acquainted with the topography of the land could observe and appreciate the necessity for ditching, at the present time, as well as in the future.

## Syllabus.

All injuries, which are appreciable, and which result from the construction of the road, are legitimate subjects in the estimation of the damages. *A. & S. R. R. Co. v. Carpenter*, 14 Ill. 191. If, by the erection of embankments, land is submerged, and rendered unfit for use and cultivation, the injury can readily be appreciated.

The estimate for cattle guards must be based upon the hypothesis that the proprietor of the land may construct them. After the company has obtained the right of way, and the consequent right of operating its road, these rights must be maintained. Their protection is essential to the enjoyment by the company of its franchises, and to the security of the public. The owner of the adjoining land can not be permitted, without the consent of the company, to do any act which may obstruct the road. The construction of cattle guards under a railroad track is an obstruction to the free use of the right of way. *A. & S. R. R. Co. v. Baugh*, 14 Ill. 211.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

WILLIAM M. LOGAN

v.

HARVEY B. LUCAS *et al.*

1. STATE AND FEDERAL COURTS—*neither can interfere with the process of the other.* The State courts can not enjoin proceedings in the courts of the United States, nor the latter in the former courts.

2. The defendant in an execution issued upon a judgment rendered in the circuit court of the United States, upon bill filed in a State court, sought to enjoin, not directly, the plaintiff in the judgment, or the United States officer charged with the execution, but only a third person, who, it was alleged, caused the execution to be issued, and controlled the same, and asked that he might be restrained from any further action in respect to the

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| 89  | 237 |
| 123 | 689 |
| 50  | 237 |
| 127 | 405 |
| 50  | 237 |
| 60a | 614 |

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| 50  | 237 |
| 208 | 682 |

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Syllabus. Opinion of the Court.

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execution, or in the collection of the judgment, and that he be required to command the officer having the execution, to take no further proceedings under it. This was regarded as an attempted interference with the execution of process from a United States court, and within the rule prohibiting such interference by a State court.

3. CHANCERY—*whether a bill will be retained after its principal purpose has failed.* Where a bill was filed for the purposes of an injunction, and also asked an accounting between partners, but the bill showed there had already been a settlement between the partners and a balance due the complainant agreed upon, it being determined the injunction would not lie, it was *held*, the bill could not be retained for the mere purpose of compelling the payment of the balance struck on the settlement between the partners, the complainant having an adequate remedy at law therefor, and there being no allegation of fraud or error in the settlement as a ground for equitable cognizance.

' APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. J. M. DURHAM, for the appellant.

Mr. JOHN PATE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

It is a well recognized doctrine, that the State courts can not enjoin proceedings in the courts of the United States, nor the latter in the former courts. 2 Story's Eq. Ju. sec. 900; *Munson v. Harroun*, 34 Ill. 422.

Although the bill in this case does not seek to enjoin, directly, R. W. Booth & Co., the plaintiffs in the judgment in the United States Circuit Court, upon which the execution issued, or the United States officer charged with the execution, but only the appellees, Harvey B. & Luna Lucas, yet the bill alleges, that the appellees caused the execution to be issued, and that they control it, and asks that they may be restrained from any further action in respect to the execution, or in the collection of the judgment, and that they be required to command the officer having the execution, to take no further proceedings under it.

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This must be regarded as an attempted interference with the execution of process from a United States court.

Apparently, aside from the allegations of the bill, R. W. Booth & Co., the plaintiffs in the judgment in the circuit court of the United States, were proceeding in the collection of their judgment for their own benefit, by a writ of execution—they might properly resort to the aid of the appellees, or either of them, in the matter—and to restrain the exercise of such agency, interferes to that extent with the execution of the process.

On the showing of the bill, the judgment had been paid by Lucas, the co-defendant of Logan, and on motion of Logan, before the court which rendered the judgment, that court might have set aside the execution, and caused satisfaction to have been entered of record of the judgment. *Russell v. Hugunin et al.* 1 Scam. 562. This, or any other proper relief, in full, that court was entirely competent to administer; and the application of the appellant should have been there, rather than to a State court, for redress.

So far as the bill for an injunction was concerned, it was rightly dismissed.

Should it have been retained for any other purpose?

There is an allegation in the bill, that there has never been any final settlement between the parties, of their partnership matters, and that, upon a fair settlement of them, there would be due the complainant, in his opinion, \$4,000 or thereabouts; and the bill prays that a final account may be taken of all the partnership matters.

The partnership was in a retail mercantile business, in the town of Richview, in Washington county, in this State, commencing in 1856, and continuing till March, 1858, when it was discontinued, and the bill alleges the partnership effects were turned over to the control of Lucas, he agreeing to pay all the debts of the firm, and that there was a balance struck of the partnership matters, and it was estimated there was then due the complainant the sum of \$1,664, or thereabouts.

Notwithstanding the general allegation, that there had never been any final settlement of the partnership matters, it would appear, from other parts of the bill, that there had been a settlement, and the balance due the complainant, found; and as no fraud or error is suggested in the finding of it, but on the contrary it is made a cause of complaint, that Lucas has not paid the sum of \$1,664, the balance found due, thereby showing it to be relied on as a balance struck, no case is made by the bill for the taking of an account. The real causes of complaint, beside the judgment and execution in question, seem to be the non-payment of this sum of \$1,664, and the partnership debts, according to the agreement of Lucas. But, for the non-payment of this sum, and the violation of Lucas's agreement in not paying the partnership debts, the complainant has a sufficient remedy at law.

We are of opinion the bill was rightly dismissed, and the decree of the court below is affirmed.

*Decree affirmed.*

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JOHN TROTTER

v.

BASIL B. SMITH *et al.*

1. BILL TO REDEEM—*where a judgment debtor has been induced to let the statutory period for redemption expire.* A judgment debtor, whose land had been sold under execution, was induced to allow the time prescribed by the statute for him to redeem, to pass without making redemption, on the promise of another that he would aid him in redeeming after the twelve months expired, through a judgment creditor. Accordingly, before the time for redemption by a judgment creditor had expired, the debtor confessed a judgment in favor of the party thus promising to aid him, and of another, an attorney at law, who had advised the same course, for the purpose of such redemption, and these judgment creditors redeemed the

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Syllabus. Opinion of the Court.

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promise from the original sale, and the attorney, having purchased the interest of the other, obtained a sheriff's deed, and refused to permit the debtor to redeem from him: *Held*, upon bill filed for that purpose, the debtor, under the circumstances, was entitled to redeem from the party who had thus acquired the title. Having lost his right to redeem under the statute by reason of the promise of assistance, the party making that promise could not be allowed to disappoint the expectation he had created in the debtor's mind that the redemption should be for his benefit.

2. ATTORNEY AND CLIENT. Nor could the attorney, who had participated in the redemption, and finally obtained the title, stand in any different attitude towards the debtor, for while he made no promise of aid in respect to a redemption by a judgment creditor, he advised the debtor, when consulted by him on the subject, not to redeem as a judgment debtor, but to make redemption after the twelve months, in the other mode. The relation of the attorney, in that capacity, to the transaction, would prevent him from holding the land as against his client.

3. Moreover, if it had been agreed between the debtor and the attorney that the latter should retain the land under his redemption, such an agreement would not be binding upon the client. The land was worth nearly four times the amount required to make the redemption, and under such circumstances so unreasonable a contract between an attorney and his client will not be sustained.

WRIT OF ERROR to the Circuit Court of Marion county ;  
the Hon. SILAS L. BRYAN, Judge, presiding.

Messrs. WILLARD & JONES, for the plaintiff in error.

Mr. M. SCHÆFFER, for the defendants in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of  
the Court:

This was a bill to redeem, brought by Trotter against Smith and Gaines, and dismissed by the circuit court on the final hearing. The record discloses the following state of facts:

In January, 1868, Trotter bought the land in controversy. It was subject to a mortgage in favor of one Yandes, which was foreclosed at the March term, 1868, and in May, 1868, it was sold under the decree and bought by Yandes for \$844.37.

At the August term, 1868, Trotter's wife obtained a decree of divorce, and also a decree for alimony for \$1100, of which

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Opinion of the Court.

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the sum of \$100 was to be paid January 1st, 1869, and the sum of \$1000 January 1st, 1870.

Trotter having failed to redeem the land within twelve months after the sale under the decree of foreclosure, one Dickens, to whom the decree for alimony had been assigned, redeemed as a judgment creditor, and, at the sale under his execution, purchased the property for the amount paid by him to redeem, and the \$100 of alimony then due.

On the last day of the sixty days allowed for a second redemption, Trotter confessed a judgment for \$100 in favor of Smith and Gaines, by virtue of which they redeemed the land, and no further redemption being made, at the expiration of sixty days, Smith, who had bought the interest of Gaines, received a sheriff's deed. Smith paid Gaines the money advanced by him to redeem, and \$125 in addition thereto. In the December following, Smith demanded possession of the land, and Trotter asked to be permitted to redeem. Smith refused this, and brought an action to recover the possession, and Trotter filed his bill in this suit.

The parties themselves were witnesses, and the only witnesses who had any knowledge of the arrangement by which the redemption was effected. Smith is an attorney at law. Trotter swears that before the twelve months after the first sale expired, he consulted Smith on this and other matters, and was advised by him not to redeem within the twelve months, but to confess a judgment and redeem in the ensuing three months through the judgment creditor. He further testifies that Smith offered to act for him in that capacity. Smith, in his testimony, does not deny this statement, and makes no reference to it. The subsequent negotiations in regard to redemption were made between Trotter and Gaines, but this advice, if given by Smith, as stated, tends to show why Trotter permitted the twelve months to expire without redeeming. That he could have raised the money to redeem is proven. The land was worth, as admitted by Smith, from \$3500 to \$4000. The amount then necessary in order to redeem was less than



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\$1200, and Trotter was offered \$2400 for the land by one person, and \$1000 for forty acres of it by another, both of whom testify to their willingness to purchase.

About the time the twelve months expired, Trotter had several conversations with Gaines in regard to redemption. Gaines finally agreed to aid him, and they went to the office of Smith for further advice. Smith then agreed to unite with Gaines in making the redemption, and the judgment was confessed to them jointly for that purpose. Smith and Gaines both testify that it was then fully explained to Trotter that his interest in the land was entirely lost. This is admitted by Trotter, but it is not inconsistent with the residue of his testimony, as he knew his own right to redeem was gone, and that he had permitted it to expire under the advice of Smith, with the expectation of raising the money and redeeming through a judgment creditor. Smith and Gaines, however, further testify that it was agreed between all the parties that the only benefit to be derived by Trotter from the proposed redemption was, that he was to be permitted to gather and remove the corn crop on the land, worth about \$250. This is denied by Trotter.

The case is by no means free from doubt, but we are of opinion that all the circumstances require us to permit a redemption, especially as such a decree imposes no loss or hardship upon either party. The business was managed with singular carelessness by Trotter, but the evidence leads us to the conclusion that he was a simple and credulous man, who trusted implicitly to Gaines' professed willingness to aid him. The fact, that he could have sold the land for twice the sum necessary to redeem, is clear, and we can only account for his not doing so by his reliance on the promise of Gaines to redeem for him, and thus enable him to save the farm, which was worth much more than the price offered. He testifies, that Gaines dissuaded him from selling, saying, that he did not wish Wolf, the person desiring to buy, to have the land, and that he would himself redeem. This is denied by Gaines, but as we have just stated, Trotter's conduct can only be

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explained by his reliance upon Gaines. Gaines also expressed to others his intention to help Trotter, and the fact that he subsequently sold his interest in the land for a trifling advance, and the further fact that he gave as a reason therefor, to one of the witnesses, that there would be litigation about the property, strengthen the theory that he knew Trotter had acted under the belief that the redemption was to be effected, by Gaines, for his benefit. Admitting that Smith and Gaines are correct in testifying, that when the judgment was finally confessed, Trotter was told he could have no interest in the land besides the corn crop, it was then the last day for redemption, and too late for Gaines to impose new and unreasonable terms, if Trotter had been induced by his promises to let the time pass until it was impossible for him to seek other friends, or adopt other modes of effecting a redemption. We presume, however, the fact to be, not that Gaines intended to deceive Trotter from the beginning, but that, while having no definite plan as to the terms of making the redemption, he created in the mind of Trotter a firm belief that the redemption would be made for the latter's benefit, so as to permit him to re-acquire the title to the land on reasonable terms. This expectation he can not equitably disappoint.

The position of Smith is no stronger than that of Gaines. It is true, he had had no negotiations with Trotter, and had made him no promises. But he had himself, in the first instance, advised Trotter to adopt this mode of redemption, and when he suddenly united with Gaines in becoming a nominal judgment creditor in order to redeem, Trotter had the right to hold him subject to the same equities which would control the title to be acquired by Gaines. He was in a position where he could not be permitted to make an unconscionable bargain for his own benefit. He had acted as Trotter's adviser, and his advice had led to the existing situation. Gaines and Trotter were at that moment consulting him as an attorney. The wise policy of the law, controlling the relation of attorney and client, forbids us to recognize as valid such a

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Opinion of the Court.

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contract as that upon which defendants insist, when made under such circumstances. Smith was under no obligation to redeem on any terms, but choosing to assist Gaines in doing so, he can not take from his client, though only a *quasi* client, land worth nearly four times the money to be advanced, and claim that the transaction was relieved of all objection by the permission to Trotter to remove his crop of corn.

It does not mend the matter to say that Trotter's interest in the land was legally gone, and if Smith and Gaines did not acquire the title for a small fraction of its value, some other person would have done so. It is enough to say that Smith could not thus acquire it. He and Trotter were in no position to deal with each other on equal terms, and under such circumstances it has long been the rule of law, that an unreasonable contract between an attorney and his client will not be sustained.

As already remarked, we have been somewhat perplexed as to the merits of this case, but we have arrived at the conclusion that the decree must be reversed and the cause remanded, with directions to render a decree authorizing Trotter to redeem by paying to Smith the amount of the judgment confessed in favor of Gaines and Smith, with six per cent interest thereon, and the amount of the redemption money paid by them with like interest, and whatever taxes Smith may have paid. On the other hand, Smith will be chargeable with whatever rents and profits he may have received. On the failure to pay this sum within a reasonable time, to be fixed by the court, the land will be sold for that purpose, and the surplus disposed of as the court may direct.

*Decree reversed.*

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JOSHUA E. SANDIFER

v.

THOMAS H. HOARD.

1. EVIDENCE—*admissions of prior holder of a note, as against a subsequent assignee.* Where the holder of a chose in action already matured, makes admissions and declarations against his interest in respect thereto, while such holder, such admissions and declarations are competent as original evidence against an assignee after maturity.

2. So in an action on a promissory note, by an assignee thereof, against the maker, where the defendant pleaded payment to the payee while he was holder of the note, and averred the note was assigned to plaintiff after maturity, it was *held*, that, for the purpose of showing the defense of payment, admissions and declarations of the payee made while the note was held by him, and after it was due, to the effect that it had been paid by the maker, were admissible as evidence.

3. Nor is the admissibility of such evidence affected by the circumstance, whether or not the declarant is a competent witness, or whether he was, in fact, a witness for the defendant.

4. The evidence was admissible, on the broad ground that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception.

APPEAL from the County Court of Bond county; the Hon. ENRICO GASKINS, Judge, presiding.

Mr. S. P. MOORE, for the appellant.

Messrs. S. A. & A. C. PHELPS, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was *assumpsit*, in the county court of Bond county, by appellee, as assignee, against appellant, as maker, of a promissory note, whereby the latter promised to pay to one G. J. Sandifer, one day after date, the sum of \$250. The declaration was special upon the note, and in the common counts; appellant pleaded the general issue, and plea of payment to payee while holder of the note, averring that the note was assigned

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Opinion of the Court.

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to appellee after maturity, on which issue was taken by traverse. On the trial before the court and a jury, it appeared, beyond controversy, that the note was transferred after maturity, and appellant's counsel offered to prove, by several witnesses, the admissions and declarations of the payee, made while the note was held by him, and after it was due, to the effect that it had been paid by the maker. This evidence was, upon objection of appellee's counsel, excluded by the court, and exception taken; a verdict was returned for the full amount of note and interest, and appellant moved for a new trial, which the court overruled, and gave judgment on the verdict, to which ruling exception was also taken by appellant, who appealed to this court, and assigns for error the exclusion of the evidence offered, and the decision overruling the motion for a new trial.

The court erred in excluding evidence of the declarations and admissions of the payee, under the circumstances in evidence. Where the holder of a *chose in action*, already matured, makes admissions and declarations against his interest in respect thereto, while such holder, such admissions and declarations are competent as original evidence against an assignee after maturity. *Williams v. Judy*, 3 Gilm. 282. Nor is their admissibility affected by the circumstance, whether the declarant is a competent witness or not, or whether he was, in fact, a witness for the appellant. The evidence was admissible, on the broad ground that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception. 1 Greenlf. Ev. sec. 153.

For this error, the judgment is reversed and the cause remanded.

*Judgment reversed.*



# C A S E S

## IN THE

### SUPREME COURT OF ILLINOIS.

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N O R T H E R N G R A N D D I V I S I O N .

S E P T E M B E R T E R M , 1 8 7 1 .

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J E R E M I A H T E R W I L L I G E R

v.

T H E G R E A T W E S T E R N T E L E G R A P H C O M P A N Y *et al.*

1. INCORPORATION—*telegraph company, fraudulent organization.* A number of persons organized a telegraph company, and one of the number subscribed for nearly all of the stock and transferred it to another person to hold as trustee, and to represent and sell the same, but no money was to be paid by those organizing the company, and such subscriber, by contract with the company, undertook to build two thousand miles of line, but the agreed price was largely above the cost of construction; an election was held, where a large number of well known business men, not stockholders, or consenting thereto, were elected directors; a circular was issued referring to the objects and prospects of the company, and the names of these persons were given as directors, and in the same circular persons were solicited to subscribe for stock, and it was stated that on the

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| 50  | 249 |
| 134 | 530 |
| 50  | 249 |
| 35a | 214 |
| 50  | 249 |
| 154 | 287 |
| 154 | 439 |
| 50  | 249 |
| 161 | 533 |
| 51a | 448 |
| 50  | 249 |
| 164 | 449 |

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payment of forty per cent on the share a certificate of stock would be issued, and no further call would be made thereon. It was also provided, by a by-law, that no general meeting of the stockholders, or election of directors, should be held until the two thousand miles of line should be built and equipped, or until the persons holding a majority of the stock should petition the president to call a meeting. Many persons became subscribers and paid forty per cent on their stock, and four hundred and seventeen and one half miles of line was constructed at a cost of \$126,550.90, and \$25,000 had been paid on work not completed: *Held*, that the scheme was fraudulent, intended to enrich the contractor, and the plan so devised that the *bona fide* stockholders should not have any control of the affairs of the company, by electing directors, until two thousand miles of the line should be completed.

2. It was further held, that the *bona fide* stockholders should have relief, and that the lines constructed belonged to the subsequent subscribers whose money built them, and that the contracts should all be set aside; the amount of money paid by the subscribers ascertained, and certificates of stock to be issued to them so far as paid for, at forty per cent. An election was directed to be called for a new board of directors by such stockholders, at which election only actual holders of stock subscribed and paid for should be allowed to vote, and if a settlement should not be made by the new directors with the contractor, satisfactory to the court, the cost of constructing the lines already built, as nearly as possible, to be ascertained and the contractor to be allowed the cost and a reasonable compensation for his time and labor, and the court was directed to render a decree against him for any excess, to be paid to the treasurer appointed by the new board. The president and secretary were required to produce all books and papers that might be necessary in the adjustment, and if the company, as now organized, interpose any obstacles in the way of carrying the orders of the court below into execution, a receiver to be appointed to take charge of the entire affairs of the company.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Messrs. E. & A. VAN BUREN, for the appellant.

Messrs. GOOKINS & ROBERTS and Mr. JESSE O. NORTON, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

In December, 1867, Selah Reeve, one of the defendants herein, united with six other persons to form a corporate company,



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Opinion of the Court.

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under the act of 1849, to be known as the Great Western Telegraph Company. The articles of association were duly signed by them, and subsequently filed in the office of the Secretary of State, who issued the requisite certificate. By the terms of the articles, the capital stock was to consist of \$3,000,000, divided into one hundred and twenty thousand shares of \$25 each. Valentine F. Gardner, John Hall, and Dwight Johnson, all resident in the State of New York, were described in the articles as holding each one share; Josiah Snow, of Chicago, as holding one thousand shares; David A. Gage, of Chicago, one thousand shares; Hasbrook Reeve, of New York, one hundred shares, and Selah Reeve, of Chicago, as holding one hundred and seventeen thousand eight hundred and ninety-seven shares, thus making the entire number of one hundred and twenty thousand shares. This stock, which the corporators thus professed to hold, was purely fictitious. No money was paid by any of them, and the stock represented no value. Selah Reeve, who professed to hold nearly all of it, was insolvent, and a few months thereafter filed his petition in bankruptcy and received his discharge as a bankrupt.

On the 13th of January, 1868, the corporators met and elected a board of directors, consisting of Gage, Snow, Hall, Hasbrook Reeve and Selah Reeve. Gage was elected president.

On the 25th of March, 1868, a written contract was entered into between Selah Reeve, who had previously resigned his place as a director, and the company, through Gage as president, for the construction by Reeve of two thousand miles of line, on routes to be designated by the company. No time was specified for the commencement of the work or for its completion, and no rate of compensation per mile was fixed, but the company agreed, by the following stipulation, to transfer the entire stock to Reeve on the execution of the agreement:

“In consideration of the aforesaid covenants and agreements, to be faithfully kept and performed by the said contractor,

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Opinion of the Court.

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the said Great Western Telegraph Company doth hereby covenant and agree to and with the said Selah Reeve, to issue and deliver to him certificates for shares in the capital stock of the said Great Western Telegraph Company, to wit: one hundred and twenty (120) thousand shares, on the execution of this agreement; the said shares to be owned and represented by the said Selah Reeve, in all meetings of the shareholders of said company, until such time as the same shall be subscribed, and fully paid for by other parties."

Contemporaneously with the execution of this agreement, Reeve assigned to Snow, the secretary and treasurer of the company, the one hundred and seventeen thousand eight hundred and ninety-seven shares originally subscribed by him, in trust, to sell the same to such persons as either he or the company could procure to subscribe to the stock, at the rate of \$10 per share, and to pay over the proceeds to Reeve under his contract with the company, or any contract supplementary thereto.

The next day a supplementary agreement was made and executed between Reeve, the company, and Snow as trustee. By this agreement an irrevocable authority is given to the trustee to sell stock, through the agents of the company, to subscribers at \$10 per share, the company paying to the trustee the money thus received, less a commission of 50 cents per share to be allowed to agents, and the trustee paying it to Reeve as fast as he should construct the line, in sections of ten miles each, to the satisfaction of the company. This contract also specifies the rate to be paid per mile for the construction of the line. The agreement also provides, that the trustee shall represent all the stock assigned to him by Reeve, except so much as may be subscribed and paid for by other persons.

The rate of compensation to be paid Reeve, was, as shown by the evidence, largely in excess of the cost of construction.

The next step of these parties was to put their scheme in a position to command the public confidence, and enable them

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to procure subscriptions and money. To this end they proceeded, on the 30th of March, four days after the execution of the final contract between the company and Reeve, to elect twenty-two additional directors. These new directors were selected from well known citizens and men of business in Chicago, but they were not stockholders. Some of them afterwards did subscribe, but the greater part refused to do so, or to act as directors. Of the few who subscribed, we infer from the record, only one paid any money on his subscription.

The parties conducting this scheme, having thus placed themselves in a position to impose upon the public by the unauthorized use of names that would command confidence, proceeded to issue a prospectus, setting forth the organization of the company with these names as directors, stating that the company was established under State laws and an act of Congress, for the purpose of cheapening telegraphic correspondence in the West, and that the stock would be apportioned, according to population, to the cities and villages of Illinois, Wisconsin, Minnesota, Michigan, Iowa, Indiana, Missouri, Kansas, and Nebraska. The prospectus further stated, that the stock was \$3,000,000, divided into shares of \$25 each, and that on the payment of \$10 on each share, a certificate of stock for \$25 would be issued and no further assessments would be made.

Prior to the election of the twenty-two new directors the old board had adopted by-laws. The first of these by-laws provided, that the *first* annual meeting of the stockholders of the company should be held within ninety days, after two thousand miles of the company's lines had been equipped with wires. Another by-law provided for the election of directors whenever any number of shareholders, holding a majority of the shares, shall present a written request, addressed to the president, for a meeting of shareholders for that purpose.

The prospectus did not disclose the fact, that a contract for the construction of two thousand miles of line had already

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Opinion of the Court.

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been made, and that all the stock, except an insignificant portion, had been placed, without payment, in the hands of a trustee of the contractor, with power to represent the same. Neither did the persons who were induced to become subscribers know, that until about \$1,500,000 should be subscribed, their money could be controlled by this trustee, and that they would have no voice in the management of the company, even by voting for directors, until two thousand miles of line should be constructed, unless the trustee should choose to have an election called.

By means of this prospectus, and the solicitation of agents who received a commission, large amounts of money were subscribed. As the money came in, Reeve began to construct lines under his contract. Another prospectus was issued in 1869, in which it is stated that three hundred and thirty-three miles of line were in operation on the 31st of July, 1869, that the company owed no debt, and that the net earnings of the preceding quarter, on the Milwaukee division, were at the rate of eighteen per cent on its cost. This prospectus further stated that there were already over two thousand subscribers to the stock among business men over various routes.

The evidence shows, that up to the 30th of June, 1870, Reeve had built four hundred and seventeen miles and a half of line, for which he had been paid \$126,550.90, and that he had also been paid \$25,000 on work not completed.

It should be further stated, as a part of the history of this transaction, although not important in the decision of the case, that on the 27th of March, 1868, another agreement had been made between Reeve, Snow the trustee, and the company by its president, by which Snow was appointed the agent to dispose, by subscription, of the stock conveyed to him by Reeve, and on the 26th of October, 1868, still another agreement had been made between the same parties, modifying in some unimportant particulars the previous agreements, and providing that after the completion of the two thousand miles of line, contracted for in the previous agreements, and the payment

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therefor to Reeve, the trustee should reassign to the company all the capital stock then remaining in his hands. It was further stipulated, that if the cost of construction should reduce the net profits of Reeve below twenty per cent of the agreed price, then the twenty per cent profit should be made up to him.

Among the subscribers to the stock was Terwilliger, the appellant in this case. He took one hundred shares and paid \$600, leaving a balance to be paid of \$400, to complete the forty per cent. In November, 1869, he went to the office of the company, in Chicago, and requested a certificate of stock to the amount of his payments. He was told that certificates could not be issued until the full payment of forty per cent. He then offered to pay the forty per cent, and was told that payments would not be received faster than they were called for by the directors. His interview was with Selah Reeve, and the acting secretary, a son of the secretary, Snow.

Up to the time of the commencement of this suit no certificates of stock had been issued. At least we infer this from the fact that Gage, the president, testifies he had never, to that date, signed any. We also infer from this statement, and from what was said to Terwilliger at the office, that the directors had never called for the entire forty per cent of the subscriptions, upon the payment of which the certificates were to be issued. In view of all the facts, the charge in the bill is not improbable, that the parties managing the company intended not to call in the entire forty per cent, and thus to prevent the issue of stock certificates, since, by the terms of the subscription, the payments were to be made when the directors should order, and the certificates were not to issue until the forty per cent should be paid.

Terwilliger being thus refused his certificate of stock, filed a bill in behalf of himself, and other stockholders who might choose to come in and be made parties. He tendered payment of the balance due on his subscription, and asked that

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he be decreed his certificate of stock ; that the contract between the company and Selah Reeve should be set aside as fraudulent ; that the defendants be decreed to account for the excess of money paid to Reeve above the cost of building the lines ; that a receiver be appointed, and for general relief. The Telegraph Company is made a defendant, as are also Selah Reeve, Snow, and Gage, who are charged with fraudulent combination.

About thirty stockholders came in and were made co-complainants. The only relief granted by the circuit court was a decree for the issue of the certificates of stock, on tender of the balance due. Terwilliger appealed.

An examination of this record compels the conclusion, that this entire scheme was planned and carried forward by Selah Reeve, for the purpose of enriching himself at the expense of the deluded stockholders. The facts that we have briefly stated are susceptible of no other explanation. By the articles of association he held all but an insignificant fraction of the stock. Four of the incorporators lived in New York and Brooklyn, and we hear nothing further of them. The other three, Reeve, Snow and Gage, are residents of Chicago, and manage the scheme. Of Gage it is but justice to say that he was placed upon the stand as a witness, by complainant, and testified that he received no salary as president, and had made no money out of the enterprise. He desired to have organized a new telegraph company in opposition to the existing monopoly, and he subscribed to a hundred shares of the stock assigned by Reeve to Snow, and paid \$1000 thereon. This testimony is not disputed, and his culpability consists not in an attempt to enrich himself at the expense of others, but in allowing himself to be made the passive instrument of Selah Reeve. He gave to the pretended organization the sanction of his name as president, and it was his duty to see that no improper means were taken to delude the public into a subscription, and that the interests of those who might subscribe should be protected. In this duty he has grossly failed.

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It is clear from the evidence that the entire management was left to Selah Reeve, and to Snow, who was an instrument of Reeve, coming here from New York when the company was organized, and taking the position of secretary and treasurer with a salary of \$6000 per annum, not, however, voted by the board of directors, and having two sons also drawing salaries in subordinate positions. How completely the affairs of the company were left by Gage under the control of Reeve and Snow, is evident from his own testimony. He testifies that he knew nothing of the first prospectus, upon which his name appeared as president, with the names of the twenty-two new directors; that he knows nothing as to what money has been paid to Reeve, except as is shown by the books; that he does not know what salary is paid to Snow, or to his two sons, Henry and Eugene Snow, and does not know that Henry Snow was in the employ of the company.

We mention these matters for the purpose of showing, what is apparent all through the case, that Selah Reeve controlled the affairs of the company, and that in the contract for the construction of the two thousand miles of line, upon which he has received so large a sum of money, although he had resigned his nominal directorship, he was really, in behalf of the company, contracting with himself. He testifies that he wrote the agreements of March 25th, from slips drafted by different persons, and that Snow suggested some of the points and he suggested some. The very circumstances under which the contract was made were such as to show that the interests of the company were disregarded. The contract, indeed, was, in the then condition of affairs, almost a farce, for it was a contract between a company without a dollar of paid capital, or even a dollar of subscription that was expected to be paid, and one of their own number, who was a bankrupt, for the construction of two thousand miles of line, to cost from \$600,000 to \$1,200,000, according to the number of wires strung. We say this, by itself, was farcical, and it would have remained so but for the subsequent steps by which a great sum of

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money has been drawn from unsuspecting subscribers, who knew nothing of this contract, and who, it is now gravely contended, must be bound by its terms.

The scheme is only a new variety of the many joint stock enterprises through which artful and unprincipled men, by the use of specious names and pretexts, so often enrich themselves, at the expense of the innocent subscribers to their stock. When they are brought within the jurisdiction of the courts, it is at once a duty and a pleasure to give whatever protection may be possible to their victims.

In the case before us it is apparent that the only real stockholders in this company are the persons who have paid their money as subscribers. The stock taken by the original corporators, under which the affairs of the company have been and still are controlled, was all a sham. It was purely fictitious, representing nothing. It was held chiefly by Selah Reeve, and he, through his trustee, Snow, has been able to control the affairs of the company, and to direct to his own pocket the money that has come from the *bona fide* subscribers to the stock. More than five hundred miles of line have been constructed and are in operation, for which Reeve has been paid an extravagant price, and yet the persons whose money built the line, are not permitted to have a voice in its management. Not even has a statement of its business been vouchsafed to them. The complainant was even, under a frivolous pretext, denied a certificate of stock. Yet, even if certificates of stock were to be issued, the subscribers would still be at the mercy of Reeve and Snow, so long as the contract is held valid by which the latter can represent the fictitious stock placed in his hands.

In our judgment, this entire contract with Reeve, even if the compensation to be allowed him for construction had been only reasonable, was a fraud upon the future shareholders, by whose subscription alone it was expected to construct the line. When the company issued its prospectus, and appealed to the public for subscriptions, it was bound to act in good faith.



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Yet, no man can suppose that a single share would have been subscribed, if the character of these contracts had been known. The subscribers undoubtedly expected, and had a right to expect, that the affairs of the company would be managed by *bona fide* stockholders like themselves. On that faith they subscribed. They knew the lines were to be built, and they had a right to expect that the contracts for their construction were to be let to the lowest bidder, by a board of directors representing the interests of *bona fide* subscribers. Yet, in fact, their subscriptions had already been transferred by directors representing only fictitious stock, to a person recognized by the directors as the owner of this stock, and, necessarily, on such terms as he chose to dictate, and such as practically cut them off from any opportunity to control, by directors of their own choice, the expenditure of their money. Can it be seriously contended that this was not a fraud?

The scheme wears the same colors through its entire history. The contract with Reeve had a fraudulent purpose. Not a dollar was expended under it until money was obtained from *bona fide* subscribers, and not a dollar was expected to be when it was made. The election of the twenty-two non-stockholders as directors was fraudulent. The issuing of the prospectus with their names as directors was fraudulent. The prospectus itself, in avoiding all mention of this contract, and leading subscribers to suppose that *bona fide* directors, representing *bona fide* stockholders, would control the construction of the lines, was fraudulent. The provision of the by-laws, preventing the election of a board of directors by actual stockholders, except at the pleasure of fictitious stockholders, was fraudulent. The provision in the contract with Reeve, that Snow, the trustee, should represent the fictitious stock, and thus out-vote all *bona fide* stockholders, was fraudulent. The entire scheme, in short, was so arranged as effectually to leave the stockholders and their money at the mercy of Selah Reeve.

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As we have already remarked, the actual stock of this company, and the lines which have been constructed, belong to the persons by whose money the work has been done. They are entitled to such protection as the courts can give them. To that end the decree of the circuit court will be reversed and the cause remanded. That court will render a decree setting aside all the contracts made between the company and Selah Reeve. It will ascertain what amount of money has been paid by the subscribers to stock. It will direct the company to issue certificates of stock to all subscribers who have paid their money, for as many shares as they are entitled to by the money paid, reckoning forty per cent paid upon \$25, as giving title to a share. It will direct the president and secretary of the company to call an election of a new board of directors by such stockholders, at such time and place, and on such notice, as the court shall think proper, at which election only the holders of actual stock subscribed and paid for, will be allowed to vote. Unless such newly elected board shall make an amicable settlement with Selah Reeve, and one satisfactory to the court, it will ascertain, as nearly as possible, the cost of the lines constructed or partially constructed by him, and after allowing him such cost, and a reasonable compensation for his time and labor, will enter a decree against him for any excess of money he may have received from the company, to be paid to the treasurer appointed by the new board of directors. It will direct the president and secretary of the company to produce all books and papers that may be required, before the master or in court, and if these officers, or the company as now organized, interpose any obstacles or difficulties in the way of carrying the orders of the court into execution, the court will appoint a receiver to take charge of the books, papers, affairs and business of the company, requiring such bonds as may be necessary.

The costs in this court will be taxed against Selah Reeve, David A. Gage and Josiah Snow.

*Decree reversed.*

## Syllabus.

URI OSGOOD

v.

JAMES W. BLACKMORE.

1. **JUDGMENT—jurisdiction.** Where a court of general jurisdiction receives the confession of a judgment, the presumption will be indulged that the court heard evidence that the claim was due, and proof of the execution of the power to confess the judgment. Such evidence need not be preserved in the record.

2. **POWER OF ATTORNEY—description of the note.** When a power of attorney is written on the same paper and below the note, and refers to the "foregoing note," and describes it correctly except as to the time when it was to begin to draw interest, the description is sufficient to identify the note, and the presumption is, the judgment was confessed on the note as authorized by the power of attorney. Such a case is not the same as where the judgment is confessed on a note entirely different in date from that described in the power of attorney. The case of *Chase v. Dana*, 44 Ill. 262, considered and distinguished.

3. **JURISDICTION—presumption of.** The presumption is in favor of the jurisdiction of a court of general jurisdiction, without the facts appearing in the record; on the other hand, there is no presumption in favor of the judgment of a court of inferior and limited jurisdiction; but the facts must appear in the record, showing the jurisdiction. Nor can the judgment of a court of general jurisdiction be attacked in a collateral proceeding by extrinsic evidence. If it appear from the record in the case that the court did not or could not have had jurisdiction of either the subject matter or the person of the defendant, then the presumption in favor of the judgment would be overcome.

4. **SHERIFF'S SALE—land—its division.** When the sheriff sells lands *en masse*, which could have been divided without injury to the parties, it is an irregularity that would enable the defendant to avoid the sale, on motion or otherwise, before the time for redemption expires, but it does not render the sale void.

5. **SHERIFF'S SALE OF LAND—notice.** Where a sheriff sells lands under execution on a defective or insufficient notice, the sale is not void, or even voidable, unless the purchaser has notice of the irregularity. And *bona fide* subsequent purchasers, without notice, can not be affected by such non-compliance with the statute.

6. **SAME—postponement of sale.** Where the sheriff published the notice of the sale, as required by the statute, and subsequently inserts under it: "The above sale is postponed until the 30th day of November, 1861,"

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|------|------|
| 59   | 261  |
| 22a  | 492  |
| 59   | 261  |
| 130  | 224  |
| 59   | 261  |
| 148  | 555  |
| 59   | 261  |
| 158  | 202  |
| 183  | 423  |
| 59   | 261  |
| 175  | 373  |
| 59   | 261  |
| 180  | 357  |
| 180  | 464  |
| 59   | 261  |
| 186  | *438 |
| 59   | 261  |
| 187  | *279 |
| 59   | 261  |
| 189  | *121 |
| 59   | 261  |
| 205  | *172 |
| 106a | *254 |

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which was not signed by the sheriff, but was, with the notice, published in three weekly issues of the newspaper: *Held*, that the notice of postponement of the sale thus made was sufficient, and the fact that it was only thus published sixteen days, did not render the sale void, but voidable, by the defendant, if urged in apt time.

7. **SHERIFF'S RETURN.** The return of the sheriff that he had made the sale, even if it showed a defective notice of the sale, could not affect the rights of the purchaser. The statute has not made such return evidence of any fact, nor is it a link in the chain of title, and neither immediate nor remote purchasers can be affected by it.

8. **PRACTICE—of specific objections.** Where a sheriff's deed was read in evidence, and only a general objection was interposed at the time, the objection can not be urged for the first time on error that the deed was not acknowledged before a proper officer. Had that objection been made on the trial, it could have been obviated by proving the signature of the sheriff.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

Mr. GEORGE S. HOUSE, for the appellant.

Messrs. WILLIAMS & THOMPSON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by appellant, in the Woodford circuit court, against appellee, to recover eighty acres of land. The cause was tried by the court, without a jury, by consent of parties, when the issues were found for the defendant, and a judgment for costs was rendered in his favor, and the record is brought to this court, and errors are assigned.

On the trial, appellant introduced in evidence a patent from the United States, for the land in controversy, dated the 15th day of October, 1855, conveying the land to him. The defendant then read in evidence a judgment rendered by the Superior Court of Chicago, in favor of Martin C. Bissell, against appellant and sixteen other persons, dated the 7th day of August, 1861, for the sum of \$4577. An execution was issued by the clerk on the same day, under the judgment,

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directed to the sheriff of Woodford county, which came to his hands on the 9th of the same month, and was, on that day, levied on the premises in controversy, together with other lands. Notice was given that the sale would be made on the 25th day of November, 1861, but it was postponed until the 30th, when this, with the other land, was sold, and the judgment and costs were paid, and the execution returned satisfied. At this sale, Giles Heath became the purchaser, who, on the 4th day of October, 1862, assigned the certificate of purchase to Martin C. Bissell, to whom the sheriff, after the time for a redemption had expired, made a deed for the premises in controversy.

Appellee then read a deed for the premises from Bissell to Harper and Barfoot, dated November 14th, 1867, and a deed from them conveying the premises to himself, dated January 15th, 1868. Several other deeds for other portions of the quarter of which this was a part were read in evidence, but as they in nowise relate to these premises, they are not referred to here. Appellee then read in evidence a deed from appellant, for these premises, to Milton Philbo, dated the 3d of September, 1861.

To the introduction of all this evidence, appellant objected.

When appellee had closed his evidence, appellant read in evidence a deed from Philbo reconveying the premises to him, on the 5th of January, 1869. He also produced and read in evidence a complete transcript of the recorded proceedings in the Superior Court, in the case of *Bissell v. Osgood*, and others, under which the land was sold by the sheriff. Appellee objected to the reading of this transcript, because it was irrelevant, and because the warrant of attorney, and affidavit proving its execution, were no part of the record in confessing the judgment. He also read in evidence the notice of the sale, fixed for the 25th of November, 1861, and the sheriff testified it was duly published. But immediately under it is this writing: "The above sale is postponed to the 30th day of November, 1861." It, however, was not signed by the sheriff,

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nor did it bear any date. The sheriff, however, testified that the postponement was made, and this notice of it was published before the 25th of November, the first day fixed for the sale.

Appellee introduced evidence that he purchased the land in good faith, and without any notice that it was claimed there was any irregularity in the confession of judgment, the notice, or sale; that he was to pay \$2200, and had paid about \$1000 of that sum.

The questions raised on this record are: Was the judgment valid and binding, or was it void for the want of jurisdiction in the court rendering it? And, were there such irregularities in conducting the sale as to render the sale void?

The judgment was rendered while the court was in session, and was not entered by the clerk in vacation. The judgment order recites the fact that Bissell appeared by counsel and filed his declaration, and that the defendants appeared by their attorney; that his warrant of attorney was proved, and that he confessed that defendants were indebted in the sum for which the judgment was rendered, and consented that a judgment might be rendered against them; whereupon a regular formal judgment was rendered.

It is believed to be a rule, without exception, that when a plaintiff in ejectment seeks to recover land against the defendant in execution, or when it becomes necessary to rely on a sheriff's deed, as a link in his chain of title, he is only required to produce a judgment, an execution thereon, and the sheriff's deed for the premises. This rule is so familiar that it requires no citation of authorities in its support.

Having produced these, he has shown a *prima facie* transfer of the title from the defendant in execution to the person to whom the sheriff has conveyed. If, then, the other party can show that the court rendering the judgment had no jurisdiction of either the subject matter or of the person, of the parties, the *prima facie* case is overcome. But the court, to acquire jurisdiction of the parties, has only to have them

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before it, and whether by legal notice, by service, or voluntary appearance, does not matter. And where the record shows, or the court finds, this jurisdictional fact, the record can not be contradicted or questioned in a collateral proceeding.

It is true, that if, by an inspection of the whole record, it is seen that there could not have been jurisdiction of the person, then the *prima facie* case would be overcome. But where the court has adjudged that there was jurisdiction of the person, we can not look beyond the record, or receive evidence outside of it, to disprove the finding. In this respect the question can alone be tried by the record.

The court having a general jurisdiction, and having received the confession, we will presume that proof of the notice was properly made, as required by the note, and that the power of attorney was duly executed. This was a matter *in pais*, and it is not required that this proof should be preserved in the record. But if such evidence should be preserved, then the affidavits of Heath prove these facts, and it could be no more than error to make such proof instead of calling a witness.

But it is insisted that the note described in the warrant of attorney was entirely different from the note upon which suit was brought; that there was no power conferred to confess this judgment, and that the case of *Chase v. Dana*, 44 Ill. 262, is in point, and must control this. In that case, the warrant of attorney described a note of one date, and the attorney in fact confessed a judgment on a note of a wholly different date, and there was nothing in the record from which it could be seen that the note was one and the same, and that a mistake was made in describing it in the warrant of attorney. In this case the note was payable in thirty days after written notice, with ten per cent interest per annum, while the warrant of attorney in other respects describes the same note, but says it was payable with ten per cent interest after it became due and payable.

The power of attorney commences: "Know all men by these presents, that we, \* \* \* \* are jointly and severally

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indebted to Martin C. Bissell, of Joliet, Ill., upon the foregoing promissory note bearing even date herewith, in the sum of \$5000, with interest thereon at the rate of ten per cent per annum after the same becomes due and payable, it being for money actually borrowed, and due thirty days after written notice."

The statement that they were indebted on the foregoing note, can be understood to imply nothing else than the note which was on the same paper upon which the warrant of attorney was written or printed. It will bear no other reasonable construction. And if both the instruments were on the same paper, and the note preceded the warrant of attorney on the paper, there can not be the slightest doubt that it was referred to, although misdescribed as to the time when it began to draw interest. It was, in all other respects, correctly described, and does not leave a doubt that the note referred to was that which preceded it on the same paper.

The clerk, in making out the transcript, copies first, the note found in this transcript, and immediately after, the warrant of attorney. He does not precede either with a statement from which it can be inferred they were separately filed, and we infer that the originals on file in his office were on the same paper, and the note preceded the warrant of attorney. And being fully satisfied that the note in this record is that referred to in the warrant of attorney, and that it was accidentally misdescribed only as to the time when it began to bear interest, we can not hesitate in holding that such a misdescription could not defeat the power to confess a judgment on the note.

Had the power of attorney left it clear that the note produced was not that referred to in the warrant, then the power could not have been exercised. But, in this case, no doubt can exist that this is the note upon which the attorney was authorized to confess the judgment.

But it is next urged that the attorney in fact had no power to enter the appearance of the makers of the note until it became due, and there is nothing in the record to show that



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the written notice had been given thirty days before the confession was made, and in the absence of such evidence, or a finding of the court that the notice had been given, we can not presume the proof was made.

Had this been a confession before the clerk, and not in open court, then there would have been great force in the objection. But where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. But when the court is of limited or inferior jurisdiction, such intendments will not be indulged, but the facts necessary to confer jurisdiction must appear in the proceedings.

This being the presumption, then, the court being of general and superior jurisdiction, and being in session when this judgment was rendered, we must presume that the court first heard evidence that the requisite notice was given to render the note due and payable, before the judgment was rendered. The presumption which the law indulges in favor of its jurisdiction can only be overcome, in a collateral proceeding, when the record itself shows there was no jurisdiction, and there is nothing in the record of the confession in this case which tends in the slightest degree to contradict the presumption. Had the record stated that no proof was heard as to any notice having been given, then the presumption would have been rebutted. Or had it appeared from the record that the note was not, and could not have been due, then the record would have shown that the attorney in fact had no power to enter the appearance of the defendants, and having no power, the court would have failed to acquire jurisdiction of the persons of the defendants, and the case would have been like *Chase v. Dana*, *supra*. But to render this note payable, an act had to be performed that must be proved before a recovery could be had, and we must presume in favor of the judgment of the superior court, that evidence was heard that the notice had been given to render

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the note due, and which conferred jurisdiction over the defendants.

It appears from the finding of the court, that a declaration, a warrant of attorney, note and cognovit were filed, the appearance of the defendants entered, and the amount due on the note confessed, and we will presume that the court heard evidence that the required written notice had been given to render the note due and payable. On these findings, and this presumption, we must conclude that the court below acquired full and complete jurisdiction of the parties and of the subject matter, and that the judgment supported the execution sale and sheriff's deed, and they were properly admitted in evidence.

We now come to the question, whether the sheriff's sale was so defectively made as to render it void. The land was, no doubt, susceptible of division, and if so, it should have been divided and sold in legal subdivisions of quarter sections, or of less size. Such is the requirement of the statute, and when it can be done without injury to the parties, the sheriff should make the division and sale as required. But failing to make the division is only an irregularity, which authorized appellant, if he chose to do so, to have the sale set aside on equitable terms, had application been made to the superior court before the time for redemption by the defendants had expired. But this court has never held, nor can it hold, that such a sale is void, and that a party may lie by for years after the sale has been made, the sheriff has conveyed, and others have purchased on the faith of the sale, and thus escape the effect of the sale. On the contrary, it must be held that the defendant waives the objection that the sale was made *en masse*, unless he, within the period allowed for him to redeem, moves to have the sale set aside for that reason. And even then the sale would only be set aside when it appeared that injury resulted to the defendant by the sheriff failing to divide and sell the property in smaller tracts. In this collateral proceeding, the question can not be raised.

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It is true, that, on the 31st of August, 1861, appellant entered a motion to set aside the judgment, execution and levy, but on a hearing, this motion was overruled, and that order remains unreversed.

Afterwards, on the 28th day of November, 1862, the defendants entered a motion to set aside the sale of this property on the grounds that the sheriff had not called upon any of the defendants for payment of the execution before making the sale; that the land was sold *en masse*, when it could have been divided, and was sold without a proper and legal notice. On the 6th day of June, 1866, this motion was dismissed for want of prosecution. Thus it is seen that the only remedy which appellant could have rendered availing, was not prosecuted, but abandoned.

Was the notice of the sheriff sufficient to sustain the sale? The eleventh section of the statute regulating judgments and executions, requires the notice to be given, and specifies the length of time it shall be posted up, with its other requisites. But it contains a proviso that a failure to conform to these requirements, or any other irregularity on the part of the sheriff in conducting the sale, shall not affect its validity, unless it shall be made to appear the purchaser had notice of such irregularity. The first section of the act of 1857 requires the same notice to be also published in some newspaper of the county, if one is printed therein, for three weeks successively; but that section also contains a proviso that an omission to give such notice, without good cause, shall not affect the sale, unless it be made to appear that the purchaser had notice of such irregularity at or before the sale. From these enactments, there can be no reasonable doubt that the legislature designed to render unavailing all mere formal and technical objections to the manner of conducting the sale, and even material irregularities, unless the purchaser had notice of their existence at the time he purchased.

Even if there were irregularities in advertising this sale, these purchasers would be protected, unless they were chargeable

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with notice. This seems to be the spirit of the statute, and if it were not, the law which protects innocent purchasers in other cases, applies with all its force. Here are purchasers of the property for a large sum, in all probability its full value, and who swear that they had no notice of any defect or irregularity in the judgment, execution, notice, or sale, and are entitled to protection, unless there are irregularities that would avoid the sale, and they were chargeable with notice of their existence.

The notice is good in form, but it is insisted that it was not published the requisite length of time. The notice, as first inserted, seems to have been published for more than three weeks. But after the notice had been published in one or more issues of the paper, immediately under it appeared, in the following numbers of the paper: "the above sale is postponed to the 30th day of November, 1861," and it is insisted the proof shows that this notice of postponement was insufficient, because it was not signed by the sheriff, and was not published for three weeks before the sale.

As to the first objection, we are clearly of the opinion that, inasmuch as the notice first inserted was properly signed by the sheriff, it was not essential that the notice of the postponement should have been. From its position and connection with the notice of the sale, no one could have been uninformed, who saw it, as to the time of the sale. Any person seeing it would have as certainly known that the sale would occur on the 30th day of November, as if the signature of the sheriff had been attached. No one could have been in doubt as to the time, and much less been misled by this notice. We perceive no such irregularity in this as would affect the sale, even if the purchasers were shown to have known the fact at the time they purchased.

As to the question, whether the notice of postponement was published three weeks, the evidence shows it was only sixteen days, although inserted in three weekly issues of the paper. Even if the notice of the postponement of such a sale is

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required to be published the same length of time as an ordinary notice, still this appellee can not be affected by the irregularity, unless he had notice either of the irregularity, or such facts as to put him on inquiry and charge him with notice. There is no evidence that he had actual notice, but, on the contrary, it is proved, as far as a negative can usually be proved, that he had no actual notice. These questions are fully discussed in the case of *Jackson v. Spink*, *post*, p.404, and it is there held that such irregularities do not render such a sale void, but simply voidable, when proper steps are taken by the defendant in apt time, and we deem it unnecessary to repeat the discussion of the question.

It may, however, be said the sheriff returned a copy of the notice with the execution, and that he should be presumed to have seen it in tracing title before he purchased. In the first place, it may be answered that the return of the sheriff forms no part of the title. The title would be equally as good without as with a return. Nor can the sheriff, by anything he may say in his return, in the slightest degree affect the rights of the purchaser. The statute has not made the return evidence of anything relating to the title, nor is it made notice. Hence it follows that, even if appellee had been shown to have seen the return, it could not bind or charge him by anything it contained. But a more complete answer is, that, even if it was notice, it could only be to the extent it disclosed facts relating to the notice. In his return he says he sold after having given due notice, and when the copy of the notice returned with the execution is examined, it does not appear that the postponement was published only sixteen days, or any period less than three full weeks. The notice bore date on the 4th day of October, and the sale was made on the 30th day of November following. Had there been one insertion of the notice, and then, in the next issue of the paper, the postponement had been inserted, there would still have been over six weeks before the sale in which to publish it the three weeks required by the statute. Taking the return and the notice together,

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there was nothing to excite the least suspicion in the mind of any person that there was not due notice published.

It is urged that the court below erred in admitting the sheriff's deed against the objection of appellant. The objection in the court below was general, while in this court the specific objection is urged that the deed is acknowledged before a notary public. Even if, under our statute, that officer is not empowered to take the acknowledgment of a sheriff's deed, still the objection was general, and we will presume, as the objection could, in all probability, have been readily overcome, had it been pointed out, by proving the signature of the sheriff, that the objection only was intended to apply to the competency and pertinency of the deed as evidence. The acknowledgment is no part of the deed, unless it is intended to convey a married woman's real estate, and when defectively acknowledged, its execution may be proved by any other legitimate evidence. *Stephenson v. Thompson*, 13 Ill. 186.

This court has frequently held that, where such objections are intended to be relied on, they should be specifically pointed out, or we will hold them to have been waived, and not consider them when raised for the first time in this court.

Other objections are urged in argument, but they grow out of and are dependent upon the propositions which we have discussed, and are disposed of by the views we have here presented, and further discussion is deemed unnecessary.

Perceiving no error in this record, the judgment of the court below must be affirmed.

*Judgment affirmed.*

## JOHN WILSON

v.

## THE ROCKFORD, ROCK ISLAND &amp; ST. LOUIS R. R. Co.

1. CONDEMNING RIGHT OF WAY for a railroad—under act of 1852—of the question of compensation and benefits. Where individual property is condemned for the use of a railroad, under the act of 1852, the land taken must be paid for, under all circumstances, without regard to the benefits accruing to the owner by reason of the construction and operation of the road.

2. The measure of compensation in such case, and as guaranteed by that clause of the constitution of the State, which declares that "no man's property shall be taken or applied to public use without just compensation being made to him," is the market value of the land taken.

3. But, as against the damages to portions of such owner's property not taken, resulting from the construction and operation of the road, may be set off the benefits accruing to him thereby.

4. Where the right of way run through a man's farm so as to sever a strip of about two acres from the body of the farm, thus rendering it useless to him for farming purposes, it was *held*, that while compensation could not be demanded for such strip, it not being taken by the road, yet it would form an element in estimating the damages the owner would sustain, if any, by the construction and operation of the road—such strip or its value, the great inconvenience to which the owner is put, and the danger to which he, his family and stock are exposed, in passing from one part of the farm to the other, being regarded as proper elements to be considered by the jury in assessing the damages, against which should be set off the facilities afforded by the road, and a convenient depot for getting the products of the farm to market, as also the actual increase in the market value of the farm, occasioned by the road.

5. JUDGMENT against railroad under act of 1852—for damages accruing to the owner of lands by the construction of the road—of the form thereof. The form of the judgment, where a recovery is had under the act of 1852, should conform to that prescribed by section 15 of the act.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. HARVEY E. SHIELDS, and Mr. JOHN J. GLENN, for the appellant.

Messrs. STEWART & PHELPS, for the appellee.

18—59TH ILL.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The appellant was the owner of a tract of land in Warren county, a portion of which was wanted by appellee for its road way. Commissioners were appointed, who assessed the damages of appellant at \$350, and filed their report in the office of the clerk of the circuit court of that county, in pursuance of the statute. Both parties appealed to the circuit court, when a change of venue was had to the county of Knox. There the cause was tried by a jury, they finding the same amount as the commissioners had allowed.

The verdict of the jury is as follows: "We find for plaintiff the amount of \$350 for right of way, and nothing for other damages."

On this verdict the court rendered a judgment in form, as in an ordinary action of debt or assumpsit.

To reverse this judgment Wilson appeals.

Appellant makes the points, first: that the verdict of the jury is manifestly against the weight of evidence; second, that the court allowed improper evidence to go to the jury; third, that appellee's fourth, fifth, sixth and seventh instructions, were erroneous; fourth, the court erred in modifying appellant's fifth and sixth instructions; and fifth, that the judgment is not entered in conformity to the statute.

This railroad company was incorporated by an act of February 16, 1865, and by subsequent acts, passed in 1869, its charter was amended in several particulars. The petition for the right of way, in this case, was presented at the September term, 1870, of the Warren circuit court, and the mode of proceeding is in pursuance of the act of 1852. We shall, therefore, consider the case in the light of that act, and in doing so, will virtually dispose of all the points made by appellant.

It is the leading, central idea of that act, that in all cases of condemnation of individual property for the use of a railroad,



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the land taken must be paid for under all circumstances, without regard to benefits accruing to the owner by reason of the construction of the road. This fully appears from the first, fifth, sixth and eighth sections; and, indeed, from the whole tenor of that act. Two questions are presented by the act, to the commissioners: first, the value of the land to be taken as the roadway; second, damages resulting to the owner of the land from the construction of the road through it. The first is to be made absolutely, in compliance with that clause of the constitution which declares that "no man's property shall be taken or applied to public use, without just compensation being made to him."—Art. 13, sec. 11. The second may be set off against the benefits likely to result to the owner by its construction.

The commissioners, in fixing compensation for the land actually taken, will take into their consideration the market value of the land, which can always be approximated. This value would be the measure of the compensation guaranteed by the constitution.

Did the commissioners, or the jury, give the value of the land taken for the roadway? A glance at the evidence shows they did not, for, as we understand the testimony, the land was worth \$50 or \$60 per acre without the road. Twelve acres were taken, worth at least \$600; this should have been allowed appellant absolutely. This was the compensation to which he was entitled under the law, and it was guaranteed to him by the very terms of the constitution of the State. There was also a strip of about two acres in addition, severed from the quarter section to which it belonged, rendered useless to appellant for farming purposes by the course of the road. The adjoining proprietor may be willing, or he may not be, to purchase this strip and give for it its value.

That strip has not been taken by the railroad, and compensation for it can not be demanded. It would form an element in estimating the damages appellant has sustained, if any, in cutting his land so as to render a portion of it useless to him.

## Syllabus.

In estimating the damages, this strip, or its value, the great inconvenience to which the owner is put, and the danger to which he, his family, and stock are exposed, in passing from one part of the farm to the other, would compose the elements for assessing the damages. Against these, should be set off the facilities afforded by the road, and a convenient depot, for getting the products of the farm to market, and if that be grain or pork, they would be considerable, and can be approximated by witnesses. The actual increase in the market value of the land, if caused by the railroad, should also be estimated and set off against the damages. *T. & P. R. R. Co. v. Unsicker*, 22 Ill. 221.

We forbear the expression of any opinion on the evidence, as to these points, as the case will have to go to another jury.

As to the instructions complained of, the sixth and seventh, given for appellee, should not have been given, as there is no evidence on which to base them.

The verdict is so clearly against the evidence in the cause, tested by the act of 1852, under which the proceedings were had, that the judgment must be reversed, and the cause remanded for a new trial in conformity with this opinion.

The form of the judgment will be, if a recovery is had upon another trial, according to section 15, of the act of 1852.

*Judgment reversed.*

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28a 512

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59 276  
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WILLIAM PRICE *et al.*

v.

ANN KARNES.

1. DEED ABSOLUTE IN TERMS—*when a mortgage.* The doctrine is well settled, that a deed, absolute in terms, if intended to secure an indebtedness, is a mortgage, whether the intention is manifested by a written defeasance, by parol declarations, or by the acts of the parties.

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Syllabus. Opinion of the Court.

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2. *SAME—proof.* Where a deed is absolute on its face, the proof should be clear before a court would hold it a mortgage, and decree a foreclosure or a redemption.

8. A party sold another twelve lots of ground adjoining the city of Chicago, by a conditional agreement, and \$3300 was paid, giving the purchaser the option, on seeing the property, if not satisfactory, to decline to hold it, and have the money returned; subsequently, and in July, 1857, and about one month afterward, the same grantor sold to the grantee twelve other lots in the same tract of land for \$3900, \$756 was paid, and notes given for the balance, \$1900 was paid in August, and in the same month the twenty-four lots were conveyed to the purchaser by a warranty deed; this evidenced a purchase, and where the evidence is conflicting and unsatisfactory, it was proper for the court to refuse to decree the transaction a mortgage, and to refuse permission to redeem as from a mortgage.

APPEAL from the Superior Court of Cook county.

Mr. MILTON T. PETERS and Mr. EDWARD S. BRAGG, for the appellants.

Mr. H. A. WHITE and Mr. W. T. BURGESS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

There can be no question in this case, and none is made, that the first contracts of June and July, 1857, between the parties, concerning the property in controversy, were conditional sales. It was so expressly agreed in the contracts written at the time. The purchaser could elect to take the property absolutely in fee, or she could disaffirm and have her money returned, with an agreed rate of interest.

But the real question at issue is, whether the deed of August, 1857, for the lots mentioned in the first contracts, and the deed of 1862, for an additional number of lots, both absolute in their terms, were intended to convey an indefeasible estate, or only intended by the parties as security for the money before that time advanced by the defendant to the complainants.

A conveyance of land, absolute in terms, if intended as security for a debt by the parties, is a mortgage, whether the intention is manifested by a written defeasance executed at the

## Opinion of the Court.

time of the conveyance, or by parol declarations, or by the acts of the parties. *Clark v. Henry*, 2 Cowen, 324; *Porter v. Nelson*, 4 N. H. 130; *Dwen v. Blake*, 44 Ill. 135.

This doctrine has become so well settled by numerous adjudged cases, that it is now unnecessary to multiply authorities. It has long since passed into a maxim, in the law, that "once a mortgage always a mortgage."

But, as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale. *Conway's Ex'r v. Alexander*, 7 Cranch, 218.

If we look into the deeds, we find nothing there to enlighten our inquiry. They purport to convey an absolute estate for a certain consideration stated. We find there no elements of a mortgage, no acknowledgment of a pre-existing debt, and no covenant for the payment of money. To overcome the express terms of the deed, generally, a debt must exist, and the liability to pay the same, that can be enforced in a court of law or equity. In this case, if the grantee chose to treat the deeds as mortgages, could she foreclose the same in a court of equity, and have a decree for a certain sum of money against the grantor, over his averment that this was a sale and not a mortgage? She would be held to make clear proof, to justify a decree against him.

The true intent not appearing in the instruments, we must look to the evidence *aliunde*. And here we are met, at the outset, with great difficulty. The real intention of the parties to this transaction, what they intended to, and did do, is obscured by a mass of conflicting evidence. We must say, that much of it is irreconcilable. A few facts stand admitted: In June, 1857, complainants, by a conditional contract, sold the defendant lots thirteen to twenty-four, both inclusive, in block one, in Anna Price's subdivision of the northwest quarter of the northwest quarter of section ten, in Cook county, south and adjoining the city of Chicago, for the consideration of \$3300, which was all paid. It was understood and agreed,

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that if the defendant, when she saw the property, or ascertained its value, did not like it, she was at liberty to decline the trade and have her money paid back, with interest.

In July, 1857, the complainants, under a like contract, sold to the defendant lots one to twelve, both inclusive, in block two of the same subdivision, for the sum of \$3900. The defendant, at the time of making the last contract, paid to the complainants the sum of \$756, and gave to them her note for \$3124, payable one day after date, with ten per cent interest. On the 12th day of August, 1857, defendant paid to complainants \$1000, and on the 19th day of the same month she paid the further sum of \$975, leaving, of the principal of the note, \$1159 due and unpaid. On the 28th day of August, 1857, the complainants executed and delivered to the defendant a warranty deed for the twenty-four lots described in the two contracts, for the consideration, as stated, of \$7200.

In the history of the events that led to the making of the warranty deed, and the purposes for which it was made, and the subsequent transactions between the parties, the statement of facts by the parties in interest, in their testimony, is as widely different as is their interest in the subject matter of this litigation. Resort must therefore be had to the acts of the parties, rather than their words, and to such disinterested testimony as the record presents, for the true solution of the difficulty in the case. The acts of the parties have an unmistakable meaning.

In May, 1858, the parties visited Chicago, and the property is examined. Mrs. Karnes is evidently not very well satisfied with the property, and some complaint is made that its value and location had been misrepresented to her. At this time, the agreement of May 14th, 1858, was entered into and signed in duplicate by the parties, by which it was agreed, that if Mrs. Karnes so desired, within twelve months from that date, the complainants would take back the lots and return the money received for them, with twenty per cent interest. Why this agreement was made, and the reasons that led

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to its execution by the parties, is involved in some difficulty, and the evidence affords no satisfactory answer.

The theory of the complainants, on which they rest their claim for relief, as we understand it, is, that the deed of August 28, 1857, was not designed to be an absolute conveyance, but was taken for advances made by the defendant to the complainants, with the right on the part of the defendant to have the deed become an absolute conveyance, if, upon seeing the premises, she so elected; but she did not so elect upon seeing the premises, and declined to have the deed take effect as an absolute conveyance, and only would hold the same as security for the advances, and that the character of the instrument was not thereafter changed by the parties.

That the advances made, which was the consideration of the deed of August 28, 1857, were not extinguished by that deed, but that the indebtedness for such advances continued thereafter, and still exist, and the same was recognized by both parties up to the time of the commencement of this suit.

That, by the agreement of the parties, entered into May 14, 1858, Mrs. Karnes had the right to elect to have the complainants take back the premises conveyed by that deed, and have returned to her the money advanced therefor, with interest. That Mrs. Karnes did so elect, and the complainants assented to such election, and both parties, thereafter, as before, recognized the complainants to be the owners of the premises, and as owing Mrs. Karnes for such advances, which was the consideration of the deed, and that she held the deed alone as security for such indebtedness.

On the contrary, it is insisted, on the part of the defendant, that the true meaning and legal effect of the transaction between the parties is, that the contracts of June and July, 1857, were continued in full force until the making and delivering of the deed of August 28, 1857, when they were cancelled and discharged, and that the deed was then given without conditions or restrictions, and in fulfillment of said contracts, and that Mrs. Karnes had then elected to take the property, and

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Opinion of the Court.

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that the deed vested in her the legal title to the twenty-four lots.

That the contract of May 14, 1858, was drawn up and executed by the complainants, at their own instance and request, and not at the request of the defendant, and that she, in fact, did not know the contents of the paper when she signed it, and that the legal effect of the instrument is, that the complainants thereby agreed to repurchase the property if she should so elect, within twelve months, for a price to be found by calculation, and that she did not, within the time fixed, elect not to take the property, and the complainants never, at any time, agreed to take back the property and pay her for the same, according to the terms of the contract of May 14, 1858.

We think the facts that must be considered as established by the evidence in the record, are inconsistent with the theory advanced by the complainants.

When the parties were in Chicago, in May, 1858, Mrs. Karnes then learns, for the first time, that the property conveyed to her was incumbered by the Powers mortgage, upon which there was then a considerable amount due. The mortgage covered the entire forty acres, which was subdivided, and of which the lots conveyed to her constituted a part.

In consequence of the financial crisis of 1857-8, the property had depreciated very much in value. Mrs. Karnes became very much dissatisfied, and complained that she had been overreached in the contract by the representations of the complainants as to the value and location of the property. The balance of her note of \$1159, to the complainants, remained unpaid, and it was agreed by the parties that no more should be paid until a settlement could be effected.

Instead of the property increasing in value, it continued to depreciate, and the incumbrance of the Powers mortgage still resting on the property, the parties holding the same threatening to sell under it; and Mrs. Karnes, failing to get a

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satisfactory adjustment of the matter, placed it in the hands of her attorney.

After considerable negotiation between the parties, all came together at the house of Goodwin, in the city of Quincy. It was then agreed between the parties, by way of making a final settlement of the whole matter, and as the best proposition that the complainants could then make, that the complainants would convey to Mrs. Karnes, by quit claim deed, lots three to twelve, both inclusive, in block one, of the same subdivision, which lots, at the time, were not only subject to the Powers mortgage, but also to a mortgage given to one Seehorn. The deed was then executed, and bears date March 20, 1862. It was also agreed, as a part of the settlement, that Mrs. Karnes' note of \$1159, held by the complainants, should be, and it was then, surrendered up to her; and also, that the agreement of May 14, 1858, should be cancelled, which was done, so the witness testifies, at whose house the transaction occurred. It was further agreed by complainant William Price, at that time, that the complainants would remove all incumbrances from the property, but he declined to place such agreement in the deed that conveyed the ten lots to Mrs. Karnes.

We must regard the evidence, that establishes these facts, as the better evidence in the case, for the reason that it comes from an apparently candid witness, and one totally disinterested.

The complainants still fail to remove the incumbrances from the property as they had agreed to do, for the alleged reason that they were unable to do so, being at the time financially embarrassed. The holders of the Powers mortgage still threatening to sell the property under it, the defendant became fearful that she would lose her entire property. A bitter and ill-natured correspondence then ensues between the parties. The complainants destroyed the letters of the defendant, and we are only permitted to know their contents as



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the same are reproduced from the memory of the witnesses. Nothing, however, seems to have resulted from this correspondence, and the letters are only important so far as they show the manner in which the parties treated these deeds, whether as absolute, or only as mortgages. On that question they would, and do, have an important bearing.

On the 30th day of September, 1867, Mrs. Karnes conveyed the ten lots last conveyed to her, to Eli Seehorn, in consideration of which he agreed to, and did, release her twenty-four lots from all incumbrance, so that she then held the property conveyed by the deed of August 28, 1857, free from all incumbrances. The controversy between the parties then ceased, until it is again revived by the steps taken to institute this proceeding, on the 17th day of October, 1868.

Throughout the entire history of this transaction, running through a period of nine or ten years, we are unable to discover any clear and distinct evidence that the parties ever treated the deed of August, 1858, as a mortgage for the security of indebtedness. But, on the contrary, the evidence tends to prove, and we may say does prove, that they treated it as an absolute deed. The burden of Mrs. Karnes' complaint, after the making of the deed of March 20, 1862, for the ten lots, was not that the complainants did not pay back her money, with interest, but that the incumbrances on the property were not removed, and that she was in danger of losing it entirely. This fact, itself, tends strongly to illustrate this case.

The letters of the complainant William Price, of 1865 and 1867, seem to us totally inconsistent with the claim the complainants now assert. The language used is wholly incompatible with the idea that he then considered the deed a mere mortgage for the security of his indebtedness to the defendant.

In his letter of August 7, 1865, addressed to the defendant, he says: "The transactions I had with you, were done with no intention of taking advantage, and had not the great financial crisis taken place, would have been for your profit." How for her profit, if she was simply to have her money back, with

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interest? According to his theory of the case, he was bound to pay her at all events. He evidently means to be understood, that her profit would be in the rise and increased value of her property, and not in her mere security for her debt.

Again, in his letter of September 23, 1867, addressed to the defendant, Mr. Price says: "When I saw you last, you told me one Mr. White advised you take \$1000 for your lots; now you say they are worth \$2000 or \$3000. How fast they are rising. I would advise you to keep them until you can get the price Mr. White valued them, in 1859—\$500 per lot, 50 by 177."

We have not before us the letters of the defendant, to which these are a reply, but we are at a loss to understand, if these deeds were mere mortgages, why Mr. Price is advising Mrs. Karnes not to sell *her* lots until she could get a certain price for them. If they were mere mortgages, the lots were not hers, and she would have no right to sell them; and if she did so, it would be a breach of faith. We can interpret these letters in no other light than as conceding, in terms that can not be well misunderstood, that Mrs. Karnes held this property by an absolute conveyance, subject to no defeasance whatever.

It would seem, that on the 20th day of March, 1862, when the quit claim deed for the ten additional lots was executed, in view of the transactions then taking place, that was the time, of all others, if the former deed was a mere mortgage, for him to assert it. A long period, five years, had then elapsed from the time of its execution and delivery. Yet, according to the testimony of the witness Goodwin, not one word was said by either party, at that time, as to the deed being a mortgage. It is difficult to reconcile the silence of Mr. Price, on that occasion, with the claim he now asserts.

We may safely say, that the complainants have not produced that clear proof that the law requires, to overcome the express terms of the deed, so as to be entitled to the relief sought.

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Additional opinion of the Court.

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In the case of *Dwen v. Blake*, 44 Ill. 132, this court held, and it is certainly a reasonable rule, that the parties having deliberately given the transaction all the forms of a sale, slight, indefinite or unsatisfactory evidence should not be permitted to change its character. It should only be by proof which clearly shows that the intention of the parties was, that it should be a mortgage and not a sale. To the same effect is the case of *Taintor v. Keyes et al.* 43 Ill. 332.

We are satisfied, from the evidence in the record, and must so hold, that the deeds conveyed an absolute and indefeasible estate to the grantee, Mrs. Karnes.

The bill was therefore properly dismissed, and the decree is affirmed.

*Decree affirmed.*

.. JUSTICES McALLISTER and THORNTON dissent.

After the original opinion was filed in this case, appellant filed a petition for a rehearing, which was granted. A rehearing was had, and the following additional opinion was filed:

Per CURIAM: A petition having been filed, a rehearing in this cause was allowed. We have again fully considered the case, and a majority of the court are still of opinion that the bill was properly dismissed, and the decree should be affirmed. We have, therefore, caused the original opinion to be refiled, as the opinion of the majority of the court.

*Decree affirmed.*

## Syllabus.

ARTHUR D. RICH *et al.*

v.

THE CITY OF CHICAGO.\*

1. **SPECIAL ASSESSMENT—oath of commissioners.** Where a special assessment was made for the improvement of a street in a city, it is not an objection to the validity of the assessment that the commissioners took the oath required by the city charter, and also superadded other clauses not inconsistent with the oath required by the charter, or any of its provisions.

2. **NOTICE—publication—city newspaper.** Where the city charter required the common council to designate a newspaper in which notices and the proceedings of the corporation should be published, it appeared that such notices and proceedings were published in a particular paper, and it was recognized by the officials as the corporation newspaper,—a certificate of publication given by the publisher, was offered in evidence: *Held*, that such facts, as to the public, and third persons, were *prima facie* evidence that the paper had been designated as the corporation paper, and the appointment need not be proved by producing the record showing the appointment; that it is similar to proof that a person has acted as a public officer, which is *prima facie*, without producing his commission.

3. **FORMER DECISIONS—awarding compensation, when private property is taken for public use.** The determination of what is "just compensation" for private property when taken for public use, is a judicial act, which can properly be performed only by the judicial department of the government, and former decisions of this court holding the award in that regard, of persons not of the judicial department, such as the commissioners of the board of public works in the city of Chicago, to be conclusive, are overruled.

4. **CONSTITUTION—eminent domain—trial by jury.** Where a city charter gave to the common council, and the board of public works, power to

\*This case, and the following twenty-one cases, are all considered in the same opinion:

*Trustees of Wabash Avenue Baptist Church v. City of Chicago; Snoad v. Same; Hoxie v. Same; Pearce v. Same; W. Davidson v. Same; Christ Church v. Same; Otis v. Same; J. I. Pearce v. Same; Kellogg v. Same; E. L. Davidson v. Same; Loomis v. Same; Larmon v. Same; Little v. Same; Whittaker v. Same; Mason v. Same; Spaulding v. Same; Traynor v. Same; Frisbee v. Same; Frank v. Same; Thomas v. Same; Larned v. Same.*

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assess damages on the condemnation of land for the widening of a street, and it was objected that the act was unconstitutional, because the owner was deprived of a jury: *Held*, that as the court had, in previous decisions, sustained the law, the rule *stare decisis* must be applied, and as the constitution of 1870 requires a trial by jury in all future cases, the question is not of any practical importance to determine whether a jury was indispensable, and that rights acquired under former proceedings should be protected.

5. **ASSESSMENT—benefits.** But the proceeding to assess the damages growing out of the opening of the street, is not obnoxious to any constitutional objection. The charter makes it indispensable for a sale of real estate for the payment of such an assessment, that a judgment of some court of general jurisdiction be had upon the warrant. The acts of the commissioners may be considered ministerial, and as the means by which the proceedings instituted are to be brought before the court, and for that purpose are valid. All questions pertaining to the damages sustained or benefits conferred by the condemnation of land, or other property, for public use, may be raised and tried in the court where judgment is sought on the warrant.

6. **ORDINANCE—validity of.** Where such an improvement is proposed, and it is not petitioned for by a majority of the owners of property to be assessed, the charter declares that it shall be ordered only by the votes of at least three-fourths of all the aldermen present, such vote to be by ayes and noes on the record of the common council. And if, when the record is presented, it does not appear that the improvement was ordered by a vote of three-fourths of the aldermen present, and the vote was not entered by ayes and noes: *Held*, that the ordinance is void, and judgment for a sale of the property to pay the assessment, can not be rightfully entered.

7. **NOTICE—publication—certificate.** Where there was published a notice of application for a confirmation of the assessment, and the publisher certified that the notice had been published six days consecutively, excepting Sundays and holidays, giving the date of the first but not the last publication: *Held*, the certificate was too indefinite, and was insufficient.

8. **CONVENING ORDER.** When a record is presented to this court on error, it should have a *placita*, that it may appear that the record presents the proceedings of a court.

APPEALS from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. EDWARD ROBY, for the appellants.

Mr. M. F. TULEY, city counsel, for the appellee.

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MR. JUSTICE McALLISTER delivered the opinion of the Court :

These cases purport to arise upon proceedings instituted by the corporate authorities of the city of Chicago, for the condemnation of land, in order to widen Michigan Avenue from Twenty-second to Thirty-second street, in the city.

Application was made at the March term, 1870, of the Superior Court of Chicago, for judgment upon the collector's report, and judgment ordered, from which an appeal was taken to this court.

The questions presented, which we propose to consider, being common to all of the cases, they will, consequently, all be treated as one case.

The first point made, questions the sufficiency of the oath taken by the commissioners. The 6th section of chapter 7, of charter, (Gary's Laws 1866, p. 62,) declares that, "before proceeding to make said assessment, the commissioners shall be sworn faithfully to execute their duties according to the best of their ability."

The oath which was taken, not only contains the very language just quoted, but goes further, and specifies certain duties, but not all, which they were required to perform in the premises. These specifications being consistent, as far as they went, with the oath which they were required to take, can not vitiate the proceeding.

The second objection is, that it was not sufficiently shown that the newspaper in which certain notices were claimed to have been published, had been duly designated as the corporation newspaper.

There was, at least, *prima facie* evidence that the "Chicago Republican," the paper in question, was the corporation newspaper. The charter, in every instance except one, where notices are required to be published, says, that they shall be published in the "corporation newspaper." This paper was conducted as the corporation newspaper, and the fact seems to

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have been notorious. All official acts of the city, required to be published, had, for a long period of time, been published in it; so that, as affecting the public and third persons, proof that the paper in question was conducted notoriously as the corporation newspaper, and so recognized by the city authorities, was *prima facie* sufficient without introducing the resolution of the council designating it as such.

All rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they were designed. Wherefore the general rule, that the best evidence of which the case, in its nature, is susceptible, must be produced, is subject to exceptions where the general convenience requires it. "Proof, for example, that an individual has acted notoriously as a public officer, is *prima facie* evidence of his official character, without producing his commission or appointment." 1 Greenlf. Ev. sec. 83.

The third objection assails the foundation of the entire proceeding, and is one of a graver character. The appellants' counsel insists, that the judgments should all be reversed, on the ground that the provisions of the city charter, relative to the taking of private property for public use, are unconstitutional and void, because they purport to vest the board of public works and the common council of the city of Chicago with authority to inaugurate proceedings, in their discretion, for taking such property; to determine all preliminary facts, and fix the compensation to be made; to effectuate, by their own acts, the condemnation of the property of the citizen, and divest him thereof; and their decision is made final and conclusive. This, it is claimed, is the exercise of judicial authority, which, by the division of the powers of the government by the State constitution, is expressly prohibited to all departments of the government not belonging to the judicial; neither the board of public works nor common council can be said to belong, in any sense, to the judicial department.

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On the other hand, the counsel for the corporation insists, that none of the guarantees of the constitution, as to the inviolability of private property, have any application to the exercise of the right of eminent domain ; that it is the attribute of political sovereignty, an inherent political right, whose exercise is an act of public administration, and the form and manner of its performance is such as the legislature may prescribe ; that "the State, through the legislature, is only restricted in the exercise of the power by the express limitation on the power, *eo nomine*, contained in the constitution, to-wit : the making of just compensation." He claims that, notwithstanding this limitation upon the power, it is a subject resting entirely within legislative discretion, and beyond the domain of the judicial department, for he says, that "the constitutional provisions, as to the division of the powers of government, have no application to the exercise of the right of eminent domain."

If we correctly understand the position of the counsel, it is that of legislative supremacy over private property, taken or applied to public use, as absolute as that asserted and conceded on behalf of the British parliament. The absolutism of the English parliament is fully asserted in the following decision : In speaking of turnpike acts, paving acts, etc., Lord KENYON said : "If the legislature thought it necessary, as they do in many cases, they would enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction." *Governor, etc. v. Meredith*, 4 Term R. 795.

We had supposed, that the restraints which have been placed upon the supremacy of legislatures over the rights of private property, was a distinguishing feature of the American from the English system.

The right to "just compensation," required by our constitution to be made as a condition precedent to the exercise of the



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right of eminent domain, is of little value if the legislature may vest the power of final adjudication in any sort of a tribunal it chooses. Of what value would all the vaunted rights of freemen be, if the legislature could clothe every petty magistrate in the land with authority to pass final decrees of forfeiture of such rights as caprice, malice, or popular clamor, might dictate?

Rights of persons, and of property, may be recognized in the theory of government as fundamental and sacred; may even be solemnly enunciated in the constitution; still, so long as they exist only in contemplation of law, and are left without the adequate means for their protection and enforcement, they are of no more practical value to the individual than the most barren abstractions of theorists.

The decisions of other States have been cited to show that, in choosing the instrumentalities through which compensation shall be ascertained, the discretion of the legislature has no limit. We can say, with confidence, that the constitutions of some of these States are unlike ours. To those of some of the other States, whose decisions are referred to, we have not access, but, from the decisions themselves, must conclude that they are essentially different. We will take, for example, the language of the supreme court of Pennsylvania, quoted by the counsel for the city: "The assessment by the canal commissioners," say the court, "is as fully authorized by the constitution as an assessment by any other tribunal. A sovereign State is not liable to an action at law against her consent, and the right of trial by jury has no existence in such case. The mode of assessment rests with the legislature, and the common law courts have no authority to question the justice of the decrees of tribunals clothed with power to make final adjudication on the subject." *Segat v. Commonwealth*, 19 Penn. St. R. 460.

Here, the award is characterized as a "decree"—a "final adjudication of the subject"—and the canal commissioners are termed a tribunal, authorized by the constitution.

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But where, among all the provisions of the constitution of 1848, under which the charter of Chicago was passed, will be found any authority to create such a tribunal?

The commissioners of the board of public works are mere ministerial officers, and the common council a *quasi* legislative body. Whence does the legislature derive authority to create either, or both, into a tribunal, to hear, and finally determine, questions of law and fact, to pass decrees, and make formal adjudication of the subject?

The counsel says, by virtue of an inherent political right—the attribute of political sovereignty—the power of public administration upon private property, whenever the public might require its appropriation. He says: “The right of eminent domain is inherent in sovereignty, and exists *dehors* the constitution, and no provision of a constitution, which, by its terms, does not refer to that right, has been held by the courts to be any limitation upon the legislature as to the mode in which the power is to be exercised.”

There is no doubt, but the right in question is inherent in sovereignty, like the power of taxation; and, without constitutional restraints, the only security which the citizen would have from an unjust and oppressive exercise of it, would be in the wisdom and justice of the representative body, and its dependence on its constituents. But that security has not been deemed sufficient. Limitations, requiring equality and uniformity, have been placed by the constitution upon the power of taxation, which, when disregarded or transcended by the legislature, may authorize the withdrawal of the subject from what would, otherwise, be the arbitrary discretion of that body, and bring it within judicial cognizance. *City of Chicago v. Larned*, 34 Ill. 203; *The People v. Bradley*, 39 ib. 130; 44 ib. 229, 240.

So, in the same spirit of jealousy, the bill of rights declares: “Nor shall any man’s property be taken or applied to public use, without the consent of his representatives in the general assembly, nor without just compensation being made to him.”

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Is not this a reference, in terms, to the right? And is it not obvious, that the legislature can not do as it chooses, and leave those, who happen to suffer by the exercise of the right, without remedy, or with a nominal one only, as the English parliament may? The language is not directory; it is negative—prohibitory; that is, the right shall not be exercised at all, except upon the condition of *just* compensation being made to the owner. Who shall determine what is *just* compensation? If the legislature, in its discretion, can prescribe both the tribunals, and the elements of the judgment, then the decrees of such tribunals, no matter how far short of the constitutional requirement, would be final and conclusive, and the party affected left without other remedy, so long as the particular tribunal kept within its jurisdiction. Such consequences could not have escaped the vigilant attention of the framers of the constitution.

By section 2 of article 9 of the constitution, it is declared that: "The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." The act of fixing valuation and making assessments, is judicial in its nature. *Weaver v. Devendorf*, 3 Denio R. 117; *Prosser v. Secor*, 5 Barb. R. 607.

But, so careful were the framers of the constitution to preserve harmony of principle in that instrument, and at the same time establish a convenient mode of exercising the power of taxation, as limited, the section further provides: "Such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." If they had intended that the question of "just compensation," when private property should be taken or applied to public use, should, like that of valuation for the purposes of taxation, be ascertained by such person or persons as the general assembly should direct, would they not have said so? If such had been the intention, why is the authority expressly given in the one case, and omitted

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in the other? We think such was not the intention, and that it is apparent, from the whole instrument, that in exercising the right of eminent domain, it was intended that the legislature should address itself to the judiciary. Limitations are placed upon the sovereign power, both of taxation and eminent domain, by requiring uniformity and valuation to be the standard of the former, and just compensation as a condition to the exercise of the latter. The act of ascertaining the value is, as we have said, judicial in its nature. The constitution carefully authorizes the designation of persons, not of the judicial department, to ascertain the value for the purposes of taxation, but as carefully withholds authority to designate any person or special tribunal to assess compensation for taking private property. It declares a division of the powers of the government into three *distinct* departments, and that each of those departments shall be confided to a *separate* body of magistracy, to-wit: those which are legislative to one; those which are executive to another; and those which are judicial to another. Then follows this emphatic prohibition: "No person, or collection of persons, being of *one* of these departments, shall exercise *any power properly belonging to either of the others*, except as herein expressly directed or permitted; and all acts in contravention of this section shall be void."

If the determination of the question of just compensation, with its incidents, be in its nature a judicial proceeding, then, under which department does the power to make it, properly belong? To this question there can be but one answer, and that is, to the judicial department.

Here, then, the question arises: Is the determination of that question, with its incidents, a judicial act?

"The award," says Pierce, speaking of condemnation of land for railroad purposes, "is a judicial act, and unless appealed from, becomes, like a judgment at law, *res judicata*, and can not be collaterally impeached." Pierce on Railways, p. 168, and note 1, where many authorities are cited in support of the text.

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Judge Cooley, in his excellent work upon Constitutional Limitations, speaking of the same subject, says: "What the tribunal shall be which is to assess the compensation, must be determined either by the constitution, or by the statute which provides for the appropriation. The case is not one where, as matter of right, the party is entitled to a trial by jury, unless the constitution has provided that tribunal for the purpose. Nevertheless, the proceeding is *judicial in its character*, and the party in interest is entitled to have an impartial tribunal, and the usual rights and privileges which attend judicial investigations." Cooley Const. Lim. 563.

We have given expression to the views of a majority of the court, and it is apparent, from what has been said, that, if the question were a new one, we should have great difficulty in reconciling with the constitution the taking of private property for public use, without ascertaining the compensation through the machinery furnished by the judicial department of the government.

We are, however, of the opinion, that this proceeding, which is for the assessment of the damages against property specially benefited, is open to no constitutional objection. The 9th chapter of the charter makes it indispensable to a sale of real estate, for payment of such an assessment, that a judgment of some court, of general jurisdiction, be had upon the warrant. The acts of the commissioners may therefore be considered as ministerial, and not judicial. They are the means by which the proceedings are initiated and the cause brought before the court, and for that purpose are valid.

It follows, from what has been said, that, upon the proper objections being made in the court to which application is made for judgment, all questions pertaining to the damages sustained, or benefits conferred by the proposed condemnation of land, or other property, for public use, may be raised and tried in the court in which judgment is sought upon the warrants, and the right to raise for decision any question going to

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the jurisdiction of the court, is one which pertains to all judicial proceedings, and can not be denied in these cases. *Create v. Chicago*, 56 Ill. 422.

In the opinion of a majority of the court, the former decisions, holding the award of the commissioners conclusive, should be overruled. This is a question, merely, of procedure, as to which the former rulings of the court may be changed, without injury to any one.

But courts are controlled by a different principle in regard to past decisions, under and upon the faith of which the community has acted for a series of years, and as to which a change of decision would lead to great public embarrassment and confusion by disturbing the rights of both public and private property.

It must not, therefore, be inferred, from what has been said, that we are disposed to hold invalid the almost innumerable condemnations which have been made in past years for streets, highways, railroads, and other public purposes, under statutes which provided no mode for bringing the matter in issue before the judicial department of the government. This court expressly decided, in 1859, that the power of eminent domain might be exercised by the ascertainment of compensation, by commissioners, under laws providing no mode of appeal to the judicial power. During the thirteen years that have since elapsed, the legislature and the public have acted under the authority of that decision. Not only has land been condemned in this manner for streets in cities, and railway purposes, but all public highways, in counties under township organization, have been opened under a law which provided no mode of appealing to the courts.

The constitution of 1870, having abrogated this mode of condemnation, and, by express language, made it indispensable to the exercise of the right of eminent domain that the compensation shall be ascertained by a jury, and consequently in a judicial proceeding, it is therefore unnecessary for this

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court to overrule its former decision for the protection of private property in the future. A decision overruling the former one, would act practically, only, upon the past, and the effect would be only disastrous, and disastrous in an extreme degree. We deem it inconsistent with our judicial duty, and the true spirit of conservatism which should govern courts, to pronounce such a judgment.

We have discussed this question because argued at length by counsel, and to assert what a majority of the court hold to be correct principles. But as the question is rendered, by the new constitution, of no practical importance for the future, we deem it our duty to apply the doctrine of *stare decisis*, when asked to make a decision that would close so many streets and highways, and be productive of so much litigation and confusion, without any compensatory results, either to the public or private individuals.

For the reasons assigned, we do not hold these judgments reversible for the unconstitutionality of the statute, but there are other errors assigned that are fatal.

Appellants, amongst other objections, filed the objection to the judgments, that there was no valid ordinance commanding the improvement, or the assessment to be made. Upon the hearing, the objectors introduced a certified copy from the office of the city clerk, of all the proceedings of record, from the first report of the commissioners recommending the work. In that report, they stated, that the improvement was not asked for by the petition of the owners of a majority of the property to be assessed. In such case, the 4th section of chapter 7 of charter, (Gary's Laws, p. 62,) declares, that the improvement "shall be ordered *only* by the votes of at least three-fourths of all the aldermen present, such vote to be entered by ayes and noes on the record of the common council." It does not appear, from the record introduced, or otherwise, that this improvement was ordered by the votes of three-fourths of all the aldermen present, and it appears, affirmatively, that

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the vote was not entered by ayes and noes on the record. We must, therefore, regard the objection as well taken.

From such certified copy of record given in evidence, it also appears, that the only proof of the notice, by the commissioners, of their meeting to make the assessment, or of making application to the council for confirmation, was a certificate, purporting to be made by the publisher of the corporation newspaper, that the notices had been published in that paper six days consecutively, excepting Sundays and holidays, commencing with a particular day, but not stating the date of the last paper containing the same, as the statute requires.

There was no evidence, on behalf of the city, that these notices were, in fact, published. When the objectors introduced the whole record, which failed to show that the notices were given as required by the charter, the *onus* was cast upon the city to prove the fact by competent evidence. Failing to do so, the intendment must be against the fact. There is still another ground of reversal: None of the records contain a *placita*. *Lawrence v. Fast*, 20 Ill. 338; *Dukes v. Rowley*, 24 Ill. 210.

For the reasons given, these judgments must be reversed and causes remanded.

*Judgments reversed.*

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JAMES L. ESTES

v.

THOMAS FURLONG.

1. BILL FOR SPECIFIC PERFORMANCE—*contract to sell land*. Where one party agrees to sell another a piece of land, at a stipulated price per acre, on which a sum of money is paid, and the vendor gives to the vendee thirty days preference to buy, one half of the price down and the balance payable within one year, with eight per cent interest, and, in addition thereto,

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|-----|-----|
| 50  | 308 |
| 140 | 136 |
| 144 | 247 |
| 50  | 298 |
| 140 | 411 |
| 44  | 492 |
| 50  | 298 |
| 100 | 280 |
| 50  | 298 |
| 175 | 335 |



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to pay a fair valuation for the dwelling house and stables on the premises, at the time the purchaser should want possession, which he could have at any time within sixty days after the first payment, and the written offer to thus sell was executed and delivered to the purchaser: *Held*, that the payment, when the written offer to sell was executed, was a payment on the purchase.

2. That this writing was sufficiently clear and explicit in its terms to constitute, when accepted, a binding agreement to sell the land.

3. CONDEMNATION OF THE LAND FOR PARK PURPOSES—*no change in the rights of parties*. Notwithstanding a law was passed four days after the agreement, authorizing commissioners to condemn lands for park purposes, and after the bill was filed for a specific performance of the agreement, the land was so condemned, and valued at double the price at which the offer was made to sell, and as the purchaser elected to take the land, and had tendered the money, and by agreement the appraisement put on the house and stabling by the commissioners was stipulated to be taken for the purposes of the suit, and their value paid to the owner, and they conveyed to the commissioners, and \$5100 of the condemnation money was also paid to him, and \$4900, the residue, it was agreed should abide the event of the litigation: *Held*, that these transactions did not affect the rights of the purchaser.

4. CONTRACT—*unilateral*. When a contract is in anywise unilateral, the court will regard any delay on the part of the purchaser with especial strictness, and will exercise its discretion with great care, but an agreement of the character of that in this case will not be regarded as invalid, or as one which will not be enforced. And the payment of the \$300 when the agreement was executed formed a sufficient consideration to support the contract, and the prompt tender of the money was the exercise of the right of election. A party who has not signed a contract for the sale of land may enforce it against one who has, although he could not be compelled to perform it; the want of mutuality may be waived by filing a bill to enforce it, and thus the remedy became mutual.

5. SAME—*valuation of property*. Where a contract to sell property stipulates that there should be a fair valuation of a portion of the same, it is implied that it is to be at a reasonable estimate made by the parties, or if they are unable to agree, then to be determined by the court. In such a case the specification of the mode of ascertainment is not an essential ingredient of the contract, but is entirely subsidiary. When, in such a case, no means of ascertaining the value of property thus sold is pointed out, any means adapted to the purpose may be employed.

6. SALE—*specific performance*. A contract to sell at a fair price, or a fair valuation, will be enforced in equity, when it is sufficiently certain, fair in all its parts, for an adequate consideration, and is capable of being performed.

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7. *CONTRACT—its execution by an illiterate person.* Where a party can not read writing, but his wife is a fair scholar, and they examine the agreement, and it was fairly explained to him by the purchaser, and there was no fraud or misrepresentation, it would be a dangerous precedent to permit such an instrument to be defeated on loose and indefinite testimony of the maker that it was not the same, when read on the trial, as when he executed it.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. SIDNEY SMITH and Mr. J. A. OWEN, for the appellant.

Mr. HENRY S. MONROE, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This bill was filed to enforce specific performance of the following agreement :

“Memorandum between Thomas Furlong and James L. Estes. For the consideration of \$300, in hand paid, the said Furlong gives the said James L. Estes thirty days preference to buy the tract of land where he lives, being the same conveyed to him by D. McIlroy, situated in west half southwest quarter, section 1, township 39, range 13 east, in Cook county, Ill., supposed to be about six acres, more or less, at the rate of \$1000 an acre, or per acre, one half down, balance on or before one year, with eight per cent interest, and in addition thereto a fair valuation price for the frame dwelling and the stabling, at the time said Estes wants possession, which he may have at any time within sixty days after the first half payment is made. Witness our hands, by said Thomas Furlong and his wife, this 3d of February, 1869.

“THOMAS FURLONG. [Seal.]

“CATHARINE FURLONG. [Seal.]”

The bill sets up that the payment of \$300 was to be a part of the purchase money, and this is plainly inferable from the testimony. The answers of Furlong to questions, as to the

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intention of this payment, display such an attempt at evasion, that they may properly be considered rather as confirmatory, than a denial, of the allegation of the bill.

The agreement was to sell the land conveyed to Furlong by McIlroy. The description in this deed, including one half of the street on the west side of the lot, shows that the area of the lot, including the half of the street, was less than five and a half acres. In the absence of proof, we infer from the plat that the road south of the lot was a public highway prior to the survey.

On the fourth day, after the execution of the agreement, a law was passed to enable commissioners to condemn land for park purposes, and between the filing and dismissal of the bill upon a final hearing, the land in controversy was condemned as a part of Humboldt Park. The land was estimated at \$2000 per acre, and the buildings at \$500.

After the condemnation of the land, and before the hearing of the bill, the parties agreed to, and did, convey to the commissioners the land in dispute. A stipulation in writing was then made by the parties, and filed in the cause, that the \$500 allowed for the improvements should be paid to Furlong, and received by him as the value of the buildings, for the purposes of the suit, and as the sum which was to be paid to him under the contract, and that \$5100 of the condemnation money should be forthwith paid to Furlong, and \$4900, the residue, should be deposited in bank until the termination of all litigation between the parties with reference to the land or money, and that the money should be paid to the party entitled thereto by the final decree, unless there was a further prosecution of the suit, by appeal or otherwise.

The concluding portion of the stipulation was as follows: "It being the true intent of this agreement to substitute said money for the land, and that the further prosecution of litigation is to determine to whom said money shall be awarded, in place of said land."

A supplemental bill was filed, setting up the occurrences which intervened between the filing of the original and supplemental bills.

The objections made to the relief prayed for, are, that the agreement was a mere option or refusal; that there was no certainty as to the amount which was to be paid; no provision as to the manner in which the buildings were to be valued; that the contract is vague and uncertain; and that the parties were not equally matched, so that there could be fairness without oppression.

Where the contract is in anywise unilateral, as in the case of an option to purchase, any delay on the part of the purchaser, in compliance with it, is regarded with especial strictness, for then laches would be more easily fixed upon the vendee, than where the contract was of the ordinary character. The court will, in such case, exercise its discretion with great care, and scan the conduct of a party claiming the benefit of such a contract. But an agreement of this character can not be regarded as invalid, or as one which will not be enforced in equity.

The consideration for the right of election within thirty days, was \$300, paid at the time the agreement was executed, and the prompt tender of the money was the exercise of the right of election.

A party, who has not signed an agreement relating to lands, may enforce it against one who has signed it, although he could not himself have been compelled to execute it.

The want of mutuality may be waived by filing a bill, and thus the remedy become mutual. *Farwell v. Lowther*, 18 Ill. 252; *Esmay v. Gorton*, 18 Ill. 483; *Frye on Spe. Perform.*, p. 200 et seq.; *McCrea v. Purmort*, 16 Wend. 460; *Perkins v. Hulsell*, 50 Ill. 217; *Sutherland v. Briggs*, 1 Hare, 26; *Walker v. Ballard*, 3 John. Ca. 532.

The true construction of this contract is, that the purchaser should, for the period of thirty days, have the right to purchase the land at the agreed price of \$1000 per acre. The

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quantity of land is fixed definitely by reference to the McIlroy deed. The time of payment is also certain. One half of the stipulated value of the land was to be paid within thirty days, and the balance on or before one year from the date of the agreement. So far, there is no incompleteness, no ambiguity, in the writing.

Possession of the premises was to be given within sixty days after the completion of the first payment, and then a fair price, to be ascertained by valuation, was to be paid for the improvements.

On the first day of March, and before the expiration of the thirty days, the purchaser tendered \$2750, including the cash payment of \$300. This was a complete tender, according to the contract. It was one half of the value of five and one half acres; and, as we have heretofore remarked, this was more than the quantity of land sold.

The only reason assigned for the refusal of the tender was, that the price of the dwelling and stable had not been estimated. As we construe the contract, the payment for the buildings was not then required.

The purchaser, however, apparently desirous to accommodate, on the next day obtained the services of a builder, and, with the consent of Furlong, had the improvements valued, and offered to pay the amount of the valuation. He even was willing to pay for them \$600, but was met with a prompt refusal, and a demand for \$1000.

Afterwards, and before the expiration of sixty days from the tender in March, the purchaser made a tender of \$6400, and demanded a deed. This sum was more than the vendor was entitled to, in any view of the agreement between the parties.

The proof shows that the improvements were not worth more than \$400, and by stipulation entered into during the progress of the cause, the vendor received \$500, as the amount which the purchaser was to pay for them, under the contract.

The contract provided that there should be a fair valuation of the dwelling and stable. This implied a reasonable estimate,

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to be made by the parties ; or, if they could not agree, to be determined by the court upon proof.

The purchaser acted in a reasonable manner, and was willing to abide by a fair valuation. He even incurred the expense of the services of a builder to ascertain the price.

On the contrary, the conduct of the vendor was reprehensible and unreasonable. After having agreed to take a fair valuation, he obstinately assumed a gross sum, as the value, and refused to yield to the opinion or appraisement of other persons.

Here, then, was a substantial contract for the sale of this land, at a fair price. The time of payment is specifically fixed, the quantity of land easily ascertained, and the price thereof determined. The mode of ascertainment of the value of the buildings, though indicated in the agreement, is not definitely settled, and did not become an essential ingredient in the contract. It is entirely subsidiary.

The purchaser did everything which was required of him. He tendered in apt time a fair price, which was refused.

Upon a bill filed for specific performance, under such circumstances, the court must determine the value upon proof. *Parkhurst v. Van Cortlandt*, 14 Johns. 15.

In *Milnes v. Gery*, 14 Ves. 401, it is said that, an agreement to sell at a fair valuation may be executed, and that where no particular means are pointed out, to ascertain the value, any means adapted to the purpose may be used by the court.

Specific performance of a contract, to sell at a fair price or fair valuation, will be enforced. *Van Doren v. Robinson*, 1 Green Eq. R. N. J. 256 ; *Frye on Spec. Perf.* sec. 219.

But this whole matter was settled, in this case, by the written stipulation of the parties. By it the vendor agreed that \$500, which he received, "shall be considered as the value of the buildings, for the purpose of said suit, and the sum which said Estes was to pay for them, under his contract."

The vendor should be estopped from any further question of the completeness of the contract. If it was vague and

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uncertain before, he has waived all difficulty by this stipulation. He has made certain that which he claimed to be uncertain.

The contract, then, was sufficiently certain, was fair in all its parts, was for an adequate consideration, and was capable of being performed.

Was there any fraud or imposition practiced? Was there unfairness, or misrepresentation, or misapprehension?

It is strongly urged that one party was a shrewd speculator, and the other an illiterate man, and therefore they were not equally matched.

It is also insisted that, as the purchaser knew that the "Park Bill" would become a law, and thus the value of the land would be greatly enhanced, it would be inequitable to enforce specific performance.

There is no proof of unfairness or misrepresentation, or concealment of facts, on the part of the purchaser.

It is true, that Furlong could not read writing, but his wife was a fair scholar. She and her husband took the contract, after it was written, into another room and examined it. They then returned to Estes, and he explained it to them. The wife then executed it, in the presence of her husband, by signing his name, as well as her own.

Furlong testified that the contract, as produced on the hearing, was different from the one read to him by Estes. His testimony is, however, rather unintelligible, and his answers, upon cross-examination, evasive.

It would be an unsafe and dangerous precedent, if a written contract is to be defeated by such evidence.

Estes admitted that he believed, before the purchase, that the Park law would be enacted. He also stated that he and Furlong talked about it, and the latter assigned the passage of the law as a reason why his land was then worth \$1000 per acre.

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We think that there was a full and intelligent consent to this contract, and that there was nothing hard and unconscionable about it.

The vendor was ignorant, but, in the eye of the law, he was capable of making a binding contract, without his solicitor at his elbow.

The land has risen suddenly in value, but each party had knowledge of the probable cause of increase, before the consummation of the trade.

We are of opinion that specific performance of the contract should be enforced, and that appellant is entitled to the relief prayed for in the supplemental bill, and provided for in the written stipulation.

The decree is reversed and the cause remanded.

*Decree reversed.*

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ANDREW M. WILEY

v.

THE TOWN OF BRIMFIELD.

1. CONSTRUCTION of an order laying out a public road, as to the time of meeting to hear reasons. An order laying out and establishing a public road, was dated August 19, 1863. It recited the preliminary steps which had been taken, and then, that on the 6th of July, 1863, the commissioners personally examined the route proposed, and before determining to lay out the road, they fixed upon a time and place for meeting to hear reasons for and against laying out the same, giving eight days' notice thereof, and, having met at the time and place appointed, heard the reasons, and having determined to lay out the road, the commissioners, on the 27th of July, 1863, caused a survey to be made: *Held*, it sufficiently appeared from the order that the commissioners held their meeting to hear reasons for and against laying out the road, within ten days after the expiration of the twenty days from the time of posting up the petition for the road. While it was not explicitly stated when the meeting was had, it might fairly be referred to the immediately preceding date of the 6th of July, which it was admitted was the last one of the required ten days, rather than to the subsequent one of July 27.



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2. **PUBLIC HIGHWAY—when opened.** When a common highway is laid out, surveyed and established, through a farm, and before the expiration of five years from that time the commissioners of highways open the fences of the farm so as to make a passway along the line of the road, but as the tenant of the owner of the land had crops growing on the farm, the commissioners gave the tenant permission to put in bars to permit persons to pass until the crops were matured: *Held*, that this was a sufficient opening of the road within five years to prevent it from being vacated under the statute.

8. **OBSTRUCTING ROAD—penalty, etc.** In a prosecution under the 94th section of the road law, for obstructing and continuing an obstruction, it must be shown that some *act* has been done by the defendant in violation of that section. A mere *omission* to do some act or obey an order of the commissioners of highways, will not warrant a conviction under that section. And where the evidence fails to show that the defendant obstructed the highway, a judgment against him is erroneous. A failure to remove the bars put in the road by his tenant without his consent, or even knowledge, could not render him liable.

4. **NEW TRIAL—terms in granting.** When the circuit court offers a party a new trial on the terms that he pay the costs, and the offer is declined, and the motion is overruled and judgment rendered on the verdict, the party may still prosecute error, and urge the refusal to give proper, and the giving of improper instructions, as grounds of reversal.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

This was a prosecution for an alleged obstruction of a public highway, and for continuing such obstruction.

Among other questions arising upon the record, is the construction of the order of the commissioners, establishing the highway, which was as follows: After reciting the presentation of a petition for the road, the order proceeds: "the commissioners of highways of said town did, on the 6th day of July, 1863, personally examine the route proposed in said petition for a road, to wit: commencing," etc., giving the route, "and having, before determining to lay out said road, fixed upon a time and place when and where we would meet to hear any reasons for or against laying the same, and having caused written notices thereof to be posted up in three of the

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Statement of the case. Opinion of the Court.

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most public places in said town, eight days previous to the time of such meeting, and having met at the time and place appointed for hearing such reasons, and having heard such as were offered, and being of the opinion that such laying out is necessary and proper, and that the public interest would be promoted thereby, and having granted the prayer of said petitioners and determined to lay out said road, we did, on the 27th day of July, 1863, cause a survey thereof to be made by a competent surveyor, as follows:" with a description of the route. "It is, therefore, ordered and determined that a road be, and the same is, hereby laid out and established according to said survey and the plat hereunto annexed and made part of this order, which is hereby declared to be a public highway four rods wide, the line of said survey being the center of said road.

"In witness whereof, we, the said commissioners, have hereunto set our hands this 19th day of August, A. D. 1863."

Other facts connected with the case are sufficiently stated in the opinion of the court.

Messrs. JOHNSON & HOPKINS, for the plaintiff in error.

Messrs. WORTHINGTON & PUTERBAUGH, for the defendant in error.

MR. JUSTICE SHELDON delivered the opinion of the Court:

This was a prosecution for the penalty prescribed by the statute for obstructing a public highway, and for continuing such obstruction, under sec. 94 of the township organization act, Sess. Laws 1861, p. 264.

It is first objected to the right of recovery, that the road alleged to be obstructed was not a public highway, because, in the proceedings for laying it out, the commissioners of highways did not hold their meeting to hear any reasons that might be offered for or against laying out the road, within ten days

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after the expiration of the twenty days from the time of posting up the petition for the road, as required by sec. 53 of said act.

The order signed by the commissioners of highways, declaring the road laid out to be a public highway, states that the commissioners personally examined the route for the road proposed to be laid out, on the 6th day of July, 1863, and it is admitted that this was within the time prescribed; that that was the last one of the required ten days; but it is supposed that the meeting to hear reasons for or against laying out the road, and the determination of the commissioners to lay it out, did not take place until the 27th day of July, 1863, and that this appears upon the face of the order. We differ from the counsel for the plaintiff in error, as to the construction of the order in this respect.

The order bears date August 19, 1863; it purports to set forth the preliminary steps which had been taken, and contains but two other dates, those of the 6th and 27th of July. It recites that the commissioners did, on the 6th day of July, personally examine the route, and that they did, on the 27th of July, cause a survey thereof to be made by a competent surveyor.

It appears by the order that, before determining to lay out the road, a time and place were fixed upon for meeting to hear reasons for or against laying it out, of which eight days' notice, as required by the statute, was given; that the meeting was accordingly held, and the commissioners determined to lay out the road.

It is not explicitly stated when this meeting to hear reasons, and determination to lay out the road, was had, but we think it may be fairly referred to the immediately preceding date of the 6th of July, and that it is more properly referable to that date, than to the subsequent one, of July 27. We think the fair import of the language of the order is, that the commissioners, having, at a previous and another time, met to hear reasons for or against the road, and determined to lay it out,

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they, at a subsequent time, to wit, July 27, caused a survey of the road to be made. The report of the survey by the surveyor, with the accompanying plat, bears the date of July 27, and we must construe that date in the order as referring exclusively to the time of the survey of the route of the road.

This objection to the validity of the proceedings in laying out the road, we do not consider to be well taken.

It is next objected, that the road was not opened within five years after it was laid out, and that therefore it became vacated under section 17 of said act, which declares that, unless a highway, laid out by order of the commissioners, shall be opened within five years, the same shall become vacated. The order establishing the road was made August 19, 1863. On the first day of February, 1868, the commissioners served a written notice on Wiley to remove his fences. He not doing so, on the first day of July, 1868, they opened a passage way through his two fences, sufficiently wide to admit of the passage of teams through, and left the road so opened. It was opened elsewhere, its entire extent. A tenant of Wiley having a crop upon the premises, the commissioners at the same time gave him permission to put in bars across the openings, provided he would not hinder any one from passing through, and the tenant subsequently put them in.

We regard the road as having been sufficiently "opened" to save it from the effect of becoming vacated, under the above provision of the statute.

There is a further error assigned in the giving and refusing of instructions.

This prosecution was not under sec. 90 of said act, which declares that, if the owner of any inclosed land through which a public highway shall be laid out, shall not remove his fences after sixty days notice in writing to do so, by the commissioners of highways, they shall cause the same to be removed, and such owner shall forfeit to the town the sum of fifty cents a day for every day he shall permit his fences to remain, after the expiration of the sixty days. But it was under sec. 94, which

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provides, "If any person shall obstruct any public highway, by falling a tree or trees across the same, by encroaching upon or fencing up the same, or by placing any other obstruction therein, or by digging a ditch across the same, he shall forfeit to the town for every such offense a sum not exceeding \$10, and a sum not exceeding \$1 for every day he shall suffer such obstruction to remain after he shall have been ordered to remove the same by a commissioner or overseer of highways of the town."

Another notice to remove obstructions, which does not appear to have been in writing, was given to Wiley by a commissioner of highways, March 4, 1870.

This prosecution is for a penalty for obstructing a public highway, and continuing such obstruction from March 4th, 1870, to April 22d, 1870.

This section, under which the proceeding is had, contemplates that some *act shall be done* by the offender by placing an obstruction in a public highway, and he is subject to the penalty for suffering such obstruction by him placed in a highway to remain after being ordered to remove it. The penalty is not incurred under this section where there is nothing more than an *omission* to do an act. Section 90 is the one which affixes a penalty for an omission to remove fences erected before the laying out of the road. There does not appear to be any proof that Wiley did any thing in the way of obstructing the road, but that he only failed to remove his fences. The fences remained as they were when the road was laid out. The only change in them was made by the tenant of the plaintiff in error, in putting in bars, with the express permission of the road commissioners at the time they opened the passage way through the fences, and which was done, so far as appears, without the knowledge or concurrence of Wiley. During all this while, the land was in the occupancy of his tenants.

The evidence raised a fair question, whether the cause of action, if any there was, against the defendant, was not solely under sec. 90 for not removing his fences after sixty days notice

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in writing, and not under sec. 94 for placing an obstruction in the road, and continuing such obstruction, under which last section the defendant was prosecuted. And the law, as applicable to such question, the defendant was entitled to have given to the jury, which he asked by his 4th and 13th instructions, which were refused, and were as follows :

“ *Four.* If the jury believe, from the evidence, that the only obstructions which the defendant has placed or continued upon the road in question is the continuance of his fences as they stood before the road was laid out and opened, then they will find for the defendant.

“ *Thirteen.* If the jury do not find, from the evidence, that the defendant placed an obstruction across said highway, after the same was legally opened by the highway commissioners of Brimfield, then the defendant is entitled to a verdict; and if they do not find that the defendant continued such obstruction by him placed after being notified to remove, then the plaintiff is not entitled to verdict for continuing such obstruction.”

And for the same reason, the last clause of the second instruction given for the plaintiff should not have been given, which was as follows :

“ And if the jury believe, from the evidence, that the commissioners of highways of the plaintiff notified the defendant to remove his fences within sixty days, and he refused to do so, the plaintiff can recover in this action.”

We are of opinion there was error in the refusal of the above instructions asked for the defendant, and in the giving of the last clause of the second instruction for the plaintiff.

On motion of the defendant for a new trial, the court granted him one, on the payment of all costs. Not choosing to avail himself of a new trial on such terms, judgment on the verdict was rendered against the defendant.

It was but optional with the defendant to take a new trial upon the terms imposed, or not. His not seeing fit to do so, did

not preclude him from bringing the record here and having the judgment reversed for any error of the court below in the refusing or giving of instructions. This would result from the decision in *Smith v. Gillett*, 50 Ill. 292, which is to the effect that, in order to take advantage of such an error in this court, it was not necessary that a motion for a new trial should have been made in the court below.

For the error above indicated, in the refusal and giving of instructions, the judgment is reversed and the cause remanded.

*Judgment reversed.*

CHARLES R. RICHARDSON

v

ANDREW SCHIRTZ *et al.*

**FRAUD AND CIRCUMVENTION**—*in obtaining the execution of a promissory note.* In an action on a promissory note for the sum of \$50.55, brought by an assignee thereof before maturity, against the maker and his surety, there was evidence introduced tending to show that at a public sale had by the payee of the note, the principal maker bought some hedge plants to the amount of \$5.50; that the clerk of the sale wrote the note, and told the defendants at the time they signed it, in the presence of the payee, that it was for the sum of \$5.50 and 5 cents for a stamp, making in all \$5.55; that in belief of such statement of the clerk the defendants signed the note, not knowing it was for the sum of \$50.55, and that they could not read English, the language in which the note was written: *Held*, such evidence tended to make out a case, not merely of fraud relating to the consideration of the note, but of such fraud and circumvention in obtaining its execution as, under the statute, avoided the note in the hands of a *bona fide* assignee before maturity.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

This was a suit brought by Charles R. Richardson, as assignee of Thomas Meighan, against Andrew Schirtz and Henry Hershberger, upon a promissory note for the sum of \$50.55,

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written in the English language, executed by the defendants in favor of Meighan, and assigned by the latter to the plaintiff. The circuit court rendered judgment for the defendants, and the plaintiff appeals.

Mr. JOHN CLARK, for the plaintiff.

Mr. J. A. BRIGGS, for the appellees.

Per CURIAM: This was an action originally brought before a justice of the peace, in favor of an assignee, before maturity, upon a promissory note, for the sum of \$50.55, signed by Schirtz and by Hershberger as his surety.

On the trial of the cause in the court below, on appeal, evidence was given tending to show that at a public sale, had by Thomas Meighan, the payee of the note, Schirtz purchased "hedge plants" to the amount of \$5.50; that the clerk of the sale wrote the note, and told the signers at the time they signed it, in the presence and hearing of the payee, that it was for the sum of \$5.50, and 5 cents for a stamp, making in all \$5.55; that in the belief of the statement of the clerk, that the note was for the sum of \$5.55, and not knowing that it was for the sum of \$50.55, the note was signed.

There was also evidence tending to show that the signers of the note could not read English.

The evidence tended to make out a case, not merely of fraud relating to the consideration of the note, but of fraud and circumvention in obtaining the making or executing of the note, which, under our statute, avoids the note in the hands of a *bona fide* assignee before maturity. *Easter v. Minard*, 26 Ill. 495.

We have carefully examined the evidence, and are unable to say that it does not sustain the verdict.

And we do not perceive any substantial error in the giving or refusing of instructions. There being no other errors assigned, the judgment of the court below must be affirmed.

*Judgment affirmed.*



WILLIAM A. BROWN

v.

SARAH C. BROWN.

1. *SUMMONS—service—default.* Where a bill for a divorce was, upon a default, taken as confessed, and the next day the defendants filed affidavits proving satisfactorily that the person with whom the copy of the summons was left was not a member of his family, and a motion entered to set aside the default, and be permitted to answer, but the motion was overruled: *Held*, that it was error to overrule the motion.

2. *PRACTICE—return of officer—its character.* While the rule is well established, that the return of an officer can not be contradicted, and is founded on public policy for the protection of innocent persons in their rights acquired under legal proceedings, yet there are some few cases which are excepted from the rule, and this case is one of those exceptions. But it is not in every case of a default that it will be permitted to contradict the return.

WRIT OF ERROR to the Recorder's Court of the city of Chicago; the Hon. WILLIAM K. McALLISTER, Judge, presiding.

Mr. CONSIDER H. WILLETT, for the plaintiff in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill for divorce. The defendant was defaulted, and on the next day appeared and moved to set aside the default. In support of his motion he showed, by several affidavits of a very satisfactory character, that the person with whom a copy of the summons had been left was not, as stated in the sheriff's return, a member of defendant's family. The court refused to set aside the default, and a decree of divorce was rendered.

It is perfectly well settled, as a general rule, that the return of an officer can not be disputed. Where it is sought to contradict the return collaterally, and after rights have been

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acquired upon its faith, or innocent persons are to be injuriously affected, courts should firmly apply the rule. Such has been the action of this court in cases of that character.

While, however, this is the well established general principle, cases have occasionally occurred, and will continue to do so, which, in order to prevent the perpetration of a great wrong, must be treated as exceptional. The present case is an excellent illustration. Here, the question arose upon an application to set aside a default. The suit was still pending. No rights had been acquired by any person on the faith of the return. No injury would accrue to any one in consequence of the default being set aside. The defendant having appeared for this purpose, could have been required to answer at an early day.

The rule, forbidding a return to be contradicted, is based on public policy, the reason being, that it is better to require an injured party to seek compensation by an action against the officer, for a false return, than to shake the verity and security of records. But in a proceeding of this kind it is idle to talk of such a remedy. There can be no measure for the damages. Through the false return in this case the defendant lost his wife and the care and custody of his children. What verdict against a sheriff and his sureties can furnish adequate atonement for this? The defendant, if the decree is allowed to stand, has suffered an irreparable injury, and to prevent this we think the court below should have held this case not to fall within the operation of the general rule.

We do not desire to be understood as intimating that in every case where it is sought to contradict a return, pending the suit, permission should be accorded. We only say, that cases sometimes arise, and this is one of them, where the reason of the general rule ceases, and where it is necessary to disregard it in order to prevent the commission of great injustice.

## Syllabus.

*Mineral Point Railroad Co. v. Keep*, 22 Ill. 9, and *Owens v. Ranstead*, ib. 161, are cases in which, for similar reasons, parties have been allowed to contradict a return.

The decree must be reversed and the cause remanded.

*Decree reversed.*

Mr. JUSTICE MCALLISTER took no part in the decision of this case.

JONATHAN K. COOPER

v.

WILLARD M. RANDALL *et al.*

1. EVIDENCE—*opinions of witnesses.* The mere opinion of a witness as to value, or the amount of damages property has sustained, is usually admissible, when based on information as to value, or the extent of the injury when testifying as to the amount of damage. When a witness has stated his knowledge of the value of the class of property about which he is testifying, he may usually be asked his opinion, but not otherwise.

2. It is not error for the court to refuse to permit a witness to answer a question as to the cost of constructing a house, who had stated he was not a mechanic and was unacquainted with such cost.

3. SAME—*proof as to injury to other property than that in controversy.* In an action on the case for injury to a dwelling house by the erection of a mill, by which dust, dirt and other impurities are thrown in and upon the house, it is error to exclude evidence that such impurities were thrown by the mill upon other buildings in the vicinity of plaintiff's house, as such evidence is pertinent to the issue. While such proof would not be direct as to the amount of impurities actually deposited on the plaintiff's house, it would tend to show that the mill was capable of inflicting the injury complained of, and justify the inference that if other buildings similarly situated were thus affected, the same would be true as to the plaintiff's premises.

4. SAME—*cross-examination.* The cross-examination of witnesses is largely discretionary with the court, in its scope, and a judgment will not

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Syllabus.

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be reversed because the court refused to permit a witness to answer a question on cross-examination, unless it appears that the party may have been injured thereby.

5. *SAME—in rebuttal.* In an action to recover damages for a depreciation in the value of the plaintiff's dwelling house, alleged to have been occasioned from dust and other impurities thrown upon and into the house from the defendant's mill, it is competent for the defendant to prove that such depreciation in value resulted from some other cause.

6. *REVERSIONARY INTEREST—of injury thereto.* Where a landlord has leased a house, and a mill was erected so near thereto as to deposit dust, smut, etc., on the house, a recovery for the damage occasioned thereby to the reversion may be had by the landlord; but if it is not permanent and injurious to the reversion, the landlord can not recover.

7. *MEASURE OF DAMAGES—in such case.* It would be error in such a case to permit proof that dust was thrown on the building after suit was brought, as a means of measuring damages for injuries sustained thereby prior to that time.

8. Where a reversioner sues for injury to the freehold, he must be restricted to damages to the reversionary interest, and it would be error to give an instruction which would authorize a verdict for all damages sustained, as well by the tenant in possession as the landlord. Each has his remedy: the former for injury to his possession, the latter for injury to his reversion.

9. *ACTION—for injury resulting from the use of the property of another.* In an action to recover for injury to the plaintiff's dwelling house, resulting from dust, etc., thrown thereon from the defendant's flouring mill, it is not error to instruct, for the defendant, that a man has the right to erect a mill in a proper place, and to run and use it in a proper manner, and that it is not the policy of the law to hamper and retard, but to foster such property in its proper and legitimate use, and that if the mill was in a proper place, used and operated in a proper manner, without material injury to plaintiff's reversionary interest, then the jury should find for the defendant.

10. Nor is it error in such case to instruct that the law does not give damages for every inconvenience or interruption of the rights of another. That there are annoyances which, by the nature and condition of society, must accrue to property of individuals, which do not in themselves create a legal liability. But the injury for which the law gives damages must be real, and not imaginary, and not whimsical; it must be real, and not simply inconvenience or trifling interruption.

APPEAL from the Circuit Court of Peoria county; the  
Hon. SABIN D. PUTERBAUGH, Judge, presiding.

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Messrs. HOPKINS & McCULLOCK, for the appellant.

Messrs. HARDING & MCCOY, and Mr. WM. W. O'BRIEN,  
for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellant, in the Peoria circuit court, against appellees, for the recovery of damages claimed to have been occasioned to appellant's premises by constructing and operating a flouring mill on a lot near to the premises of appellant, whereby chaff, dust, dirt and other impurities were thrown from the mill upon and into appellant's house.

The declaration contains five counts. The first, second and fourth proceed for injuries to his own occupancy of the premises, and the third and fifth for injury to his reversionary interest.

It appears from the evidence that the mill was erected in the fall of 1867, and the suit was brought in April, 1868. Appellant says he claims no damages from the old mill which occupied the ground before this one was erected. It, then, follows that the damages claimed are for injuries produced by the mill after its completion in the fall of 1867, and until April, 1868, when the suit was commenced. The case was previously submitted to this court, and is reported in 53 Ill. 24, when it was reversed, because improper evidence was admitted, and improper instructions given.

It is first insisted that the court erred in refusing to permit appellant to testify as to what, in his judgment, the damage was, occasioned by the mill. Although the court may have excluded the answer to the specific question, still he had already stated what he considered the damage. The witness stated that the property was injured in value \$1000, and thereupon appellee objected to appellant stating his judgment as to the amount of the damage, and the objection was sustained by

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the court, but it does not appear that the evidence was excluded, or the jury told to disregard it. The mere opinion of a witness as to value, or the amount of damages, is usually admissible, when based on information as to value, or the extent of injury property has sustained, when testifying as to its damage. When a party has stated his knowledge of the value of the class of property about which he is testifying, he may usually be asked his opinion, but not otherwise. But while this evidence was unobjectionable, it does not seem to have been taken from the jury, and he stated the property to have been, in his judgment, worth, in market, before the mill was erected, \$3000, and afterwards but \$2000, which was another mode of stating the same thing, with the reason for judgment. It is impossible for us to see how the least injury could have resulted to appellant from this action of the court.

The court below refused to permit appellant to prove that the mill threw dust, smut and other impurities of the same kind, upon other property in the same vicinity. And this is assigned as error. A majority of the court are of the opinion that this evidence was admissible, for the reason that it tended to show the extent and character of the injury sustained by appellant; that while it was not direct as to the amount of impurities actually deposited, it tended to show that the mill was capable of inflicting the injury complained of by appellant. If the deposit was general in the immediate neighborhood, and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of appellant's house. It would, if admitted, have tended to strengthen and lend weight to the other evidence appellant had already introduced. When it is considered that the issue in the case was, whether smut, dirt, etc., was deposited on appellant's house, and this was the question controlling the case, the pertinency of this evidence becomes obvious. Had it related to a collateral question, or had it been but incidentally involved, it might have been otherwise. The evidence was, therefore, improperly rejected.

It is next insisted that the court below erred in refusing to permit appellant to prove that the dust thrown upon his premises by the mill after this suit was commenced had seriously impaired the value of the property, and prevented the renting of the house. It is urged that the injury was permanent in its character, and that proof that dust was subsequently thrown upon the property would have afforded the jury another criterion for measuring the damages properly allowable. It is admitted such subsequent acts would not form the basis of damages in this suit, and this is undeniably true, as a party can only recover damages for acts done before the suit was commenced. When, however, a wrongful act is done which produces an injury which is not only immediate, but, from its very nature, is permanent, and must necessarily continue to produce loss independent of any subsequent wrongful acts, then all damages resulting both before and after the commencement of the suit, may be estimated and recovered in one action. Here the right to recover is based upon the act of causing dust, etc., to be thrown on the premises prior to the commencement of the suit, and if that caused a permanent injury, then the jury could have given damages to the full extent it had produced injury.

When, for instance, a party undermines the foundation wall of another's house, and permanent injury results by its continuing to injure the house after the suit is brought, then subsequent damage may be recovered, as it all flows from the same act. But when subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought. If a different rule were to prevail, a plaintiff would be enabled to recover double damages. In this case, we can not comprehend how proof may be made of the amount of damages caused by subsequent acts, as a criterion to measure the damages from acts previously done, and still not recover damages for such subsequent acts. To permit proof of such damages would necessarily be to allow such damages, and the defendant still be liable to another

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suit and recovery for such subsequent acts. It seems to us that it was intended, under another name, to recover damages that could not be had in this action. We perceive no error in this ruling of the court.

It is urged that the court erred in not permitting the witness Anderson to state whether this house could at any time have been built for \$2500, he having, on his direct examination, fixed its value at \$1800 or \$2000. The witness had previously stated he was not a mechanic, and had never engaged in building houses; and from this we infer that he designed to be understood as saying he had no knowledge of the cost of building houses, and for that reason the court did not err in excluding the evidence. But a stronger reason was, that all know that the cost of a building may have nothing, or very little, to do with its market value. That depends on the demand, the business of a place, location, and a variety of circumstances frequently almost entirely independent of the cost of property, or its improvement.

It is urged that the court erred in refusing to permit witnesses to answer questions on cross-examination. Such an examination is largely discretionary, and this court will not usually reverse unless we can see that the discretion has been so exercised as to have produced injury. A careful examination of the evidence in this case fails to show that there was not a sufficient latitude allowed in cross-examination, and we fail to see that, had the questions been allowed, there is the least probability that the result would have been different. It is only when we can see that it is probable that wrong has been done to the party complaining, that we will reverse for such rulings of the court.

It is objected that the court below erred in admitting evidence on behalf of appellee. As evidence of the injury sustained by the property from the erection of the mill, appellant had proved the property to have largely depreciated. When he made this proof, it was to satisfy the jury that the dust from the mill had produced that result, and that he was entitled to



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damages to that extent. This being the purpose and object of appellant's evidence, nothing could be more reasonable than to permit appellee to show that the depreciation was owing to some other cause. This is so reasonable and just that we had supposed it was elementary, and needed no adjudication to commend it to the entire profession. The greater part of the other evidence complained of is of a similar character, and there being so much of it that it would lead to prolixity to refer to each item, we will dispose of it by saying we can perceive no error in its admission.

It is insisted that the court erred in refusing appellant's fifth instruction. That instruction would, no doubt, have been proper had appellant been the occupant of the house, but when it is remembered that it was occupied by a tenant, and appellant could only recover for injury he had sustained as a reversioner, it will be seen that the rule announced in this instruction was not properly limited. The first clause of the instruction is correct in the assertion that a man must so use his own as not to injure another. But the next clause is not correct, when applied to the facts in this case. It asserts that, if appellees, in prosecuting their business, were guilty of such negligence as to cause injury to appellant's property, however slight, that would render them liable to appellant to the extent of the injury. It will be observed that this proposition entirely excludes the fact that appellant only had a reversionary interest; and yet, had it been given, it would have entitled a recovery for all of the damage done. The tenant was entitled, if injury was done, to recover damage, and no one would say that they could both recover the same damages, or that the landlord could recover for injury sustained by the tenant. If the tenant's possession was disturbed, or he was injured in the enjoyment of the property, he could recover for such injury. If the same or any other wrong produced injury to the landlord's reversionary interest, then he has a right to recover for that injury; but it does not follow that because a slight injury may have been done to the property, unless it was permanent

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in its character, that it injured appellant's reversionary interest. The third clause of the same instruction asserts the same principle as the second, but in a different form, and without the qualification necessary to have rendered the second proper. And the fourth clause asserts that if appellees caused dust, smut, etc., to be deposited on appellant's premises, the law presumes he has thereby sustained damages. This clause is vicious for the same reason. The law could not, from such facts, presume a permanent injury affecting the reversionary interest, but might as to the person in possession. There was no error in refusing this instruction. It should have been modified so as to inform the jury that any injury to the property of a permanent character, and affecting the reversion, however slight, would entitle appellant to recover to the extent of the injury sustained.

It is next urged that the court below erred in giving the sixth and eighth of appellees' instructions. These are the instructions :

No. 6.—“A flouring mill is not necessarily a nuisance, nor unlawful in its use, management or purpose. A man has a right to erect a mill in a proper place—to run, use it, etc., in a proper manner; and the policy of the law is not to hamper, obstruct or retard, but to foster, encourage and protect such property in the proper and legitimate use and operation of the same; and if said mill is in a proper place, used and operated in a proper manner, and without material injury to the possession or reversionary right or interest of plaintiff, jury should find for defendants.”

No. 8.—“The law does not give damages for every inconvenience to, or interruption of the rights of another. There are numerous annoyances which, in the nature and condition of society, must inevitably arise and accrue to property of individuals, which can not in themselves fix a legal liability on the persons causing such inconvenience or interruption. The

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Opinion of the Court.

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injury for which the law gives damages must be real, and not imaginary or whimsical. It must be sensible, tangible, and material, and not simply inconvenience or trifling interruption, and unless such injury has been inflicted in this case, the jury should find for defendants."

The court modified the sixth and eighth instructions for defendants, thus: "By the term 'material injury,' used in said instructions, is meant that the plaintiff must show a real, and not imaginary or fanciful, interference with the reasonable enjoyment of his property."

We perceive no objection to the sixth instruction, as modified. The criticism only shows that it may be tautological, but it was in nowise calculated to mislead the jury. The qualification of the eighth we think renders it free from objection. It is true, that the instruction might have omitted the words "sensible and tangible," as connected with injury. But, used in their connection, any one would understand from these terms thus employed that they were the opposite of imaginary or whimsical. And the word "material" is properly qualified. We do not see that these expressions could have misled the jury. We all know that there are many annoyances, inconveniences and interruptions incident to the enjoyment of property in a state of society, for which the law does not and can not give compensation. Persons residing in a city or near a public highway, are liable to inconvenience, annoyance and interruption in the enjoyment of their property, from the noise and dust produced from travel over streets and highways, and yet for these no one thinks of suing the person using the way, for damages. So of manufactories, machine shops, and the like. They may necessarily produce annoyances and interruptions to those in the immediate vicinity by the noise of machinery or the collection of persons at these places, and still those suffering the inconvenience have no right to recover damages.

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On a careful examination of the entire evidence, we find it conflicting, and it was for the jury to consider it and find according to its weight.

For the error indicated in rejecting evidence, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

JAMES THOMPSON

v.

BRIGGS W. SORNBERGER.

1. **FORCIBLE ENTRY AND DETAINER**—*of the possession required.* The plaintiff, to recover in an action of forcible entry and detainer, must show that he had, at the time of the alleged entry, the actual possession of the premises described. A mere constructive possession, such as the fee simple title to the land entered upon draws to it, is not sufficient.

2. **SAME**—*title not involved.* The question of title is not, in any sense, involved in the action.

3. **SAME**—*plaint and evidence under.* Proof that the plaintiff was possessed of a part of the premises described in the complaint, does not authorize a recovery of such part. The act regulating the action requires a particular description of the premises to be made in the complaint, and the proof must follow and conform to the description therein.

4. **SAME**—*limitation.* The action in England, from whence we derive it, was a criminal proceeding, and a prosecution was barred in three years after the right of action accrued. But in this State the action has been changed by express law, from a criminal to a civil proceeding, and no express limitation has been furnished. This was doubtless a *casus omisus* on the part of the legislature.\*

**APPEAL** from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

\*The 15th section of the act of April 4, 1872, (in force July 1, 1872,) provides: "All civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Sess. Laws, p. 559; Gross' Comp. vol. 2, p. 258.

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Messrs. WILLOUGHBY & GRANT, for the appellant.

Messrs. FRÖST & TUNNICLIFF and Messrs. COOLEY & GAINES, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was a complaint for forcible entry and detainer, made before a justice of the peace of Knox county, on the 14th day of February, 1870. A change of venue was awarded to Justice Levakey, before whom a trial was had, on the plea of not guilty, and the Statute of Limitations, and a verdict of guilty returned.

An appeal was taken to the circuit court, and at the October term thereof, 1870, on the first day of the term, the defendant moved to quash the complaint and dismiss the suit, which motion was denied and exception taken.

A change of venue was then had to Warren county, and the cause came on to be heard there at the January term, 1871. There was a trial by jury, and verdict and judgment for the plaintiff, the court having overruled defendant's motion in arrest of judgment.

To reverse this judgment the defendant appeals.

The complaint in substance is, that, on the 1st day of May, 1866, the defendant, Thompson, unlawfully entered into the lands and possessions of complainant, then situate, known and described as "a strip, tract, piece or parcel of land, about two rods wide at the west end of said strip, tract, etc., and about one rod wide at the east end, said strip, tract, piece or parcel of land being and lying on the north end of the west half of the northwest quarter of section 7, in township 12 north, of range 4, east of the fourth principal meridian, in the county of Knox and State of Illinois;" and that the said James Thompson then and there did unlawfully put out and expel the complainant from his said lands and possessions, wherein this complainant had at the time aforesaid an estate of freehold then and still subsisting, and had been in quiet and peaceable possession for

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more than twenty-five years preceding, and that his interest therein still subsists ; and the said James Thompson still doth hold and detain the said lands and possessions from the said complainant, unlawfully and without right, contrary to the form of the statute, etc.

Waiving all consideration of any defects which may appear in the complaint, we come at once to the consideration of the case as it appears by the testimony in the record, premising, however, the principles which govern this proceeding.

The statute of Forcible Entry and Detainer, R. S. chapter 43, provides for cases where a person shall make entry into any land or other possessions, or shall make any such entry by force, such person shall be adjudged guilty of a forcible entry and detainer, or a forcible detainer, as the case may be, within the intent and meaning of this chapter.

The judgment, if the party is found guilty, is that the plaintiff have restitution of the premises, and his costs, and a writ of restitution shall be awarded.

In the many and various discussions which this subject has undergone in this court, it has always been held, that the plaintiff, to recover, must show that he had the actual possession of the premises upon which the forcible entry is alleged to have been made ; that a mere constructive possession, such as the fee simple title to the land entered upon draws to it, is not sufficient. The title is not in any sense involved, but simply whether the plaintiff had the possession at the time defendant unlawfully invaded it and detains it. *McCartney v. McMullen*, 38 Ill. 237.

To have authorized a verdict, in this case, the plaintiff should have proved he was possessed, in fact, of the strip of land upon which the forcible entry was alleged to have been made.

How stands the proof in this regard ? When the southwest quarter of six was the property of the Smith heirs and in charge of Becker, who had one Lamb for a tenant, a worm fence was erected on the supposed south line, which, being

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Opinion of the Court.

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carried away by a freshet, was rebuilt by Lamb, with posts and rails, a few feet south of the line of the worm fence. Lamb's fence so stood when Thompson purchased and entered into possession. That fence was the only visible dividing line between the southwest of six and the northwest of seven, to the north half of which complainant has title, and has been in possession for many years.

There is no proof in the record that plaintiff was in the actual possession of the gore or strip between the old worm fence and the Lamb fence, at the time Thompson entered, and that is included in his complaint. He may have title to that strip, but as this action does not proceed on title, that can not avail him. He may, in an action of ejectment, recover the possession, but in this action of forcible entry and detainer he can not, as Thompson did not invade his actual possession of that gore or strip, he having none at the time of Thompson's purchase and entry.

The plaintiff in the action, as his complaint shows, claimed a certain strip or piece of land, of a particular description, and the proof is clear, that as to the piece of land between Lamb's fence and the old worm fence, defendant did not, on his purchase of the premises, with the Lamb fence as the southern boundary, enter upon the possession of the plaintiff. That strip was not in the possession of plaintiff when defendant entered. As to the strip of land south of the Lamb fence, and included between that fence and the fence defendant erected further south, on the line as run by the county surveyor, the defendant may be said to have entered upon the possession of the plaintiff, and had plaintiff limited his complaint to that strip, he might have sustained it. The complaint is for a larger strip or tract, which includes the last named strip, but the rule is well settled, that, in this action, a part can not be recovered. As this court said in *House v. Wilder*, 47 Ill. 510, a plaintiff claiming an entire house, is not sustained by proof of a right to the possession of a part of the

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house only. The act regulating this action requires a particular description of the premises to be made in the complaint, and the proof must follow and conform to the description therein, to warrant a recovery.

The point, that this action is barred in three years, is not tenable. In England, from which we derive this action, it was a criminal proceeding, and a prosecution was required to be instituted in three years after the cause of action had accrued.

In this State, the nature of the action has been changed by express law, from a criminal to a civil proceeding, and no express limitation has been prescribed. It is, doubtless, a *casus omissus* on the part of the legislature, which it is not the province of this court to supply.

For the reasons given, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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ANNE S. HAMILTON

v.

JAMES C. STEWART *et al.*

1. ENTRY BY FORCE—to remove fixtures. It is not lawful for a party, claiming that certain things placed in a building are fixtures, to make a forcible entry on the possession of the owner or his tenants, to remove such fixtures, and the party in possession would have the right to use a sufficient amount of force to prevent such an entry.

2. INJUNCTION. A court of chancery will not assume jurisdiction to restrain a mere breach of the peace, or ordinary trespass, where the resulting injury is not, in its nature, irreparable.

3. On the other hand, the party claiming the property as fixtures, has the right to have his title tried in the courts, and may, in such case, resort



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to the writ of replevin to obtain possession. Nor would the fact that the claimant was insolvent, change the right. The party resorting to such a writ would, before it could be executed, have to give bond as required by the statute, and hence, it would be error to enjoin the bringing of such a suit.

4. BREACH OF THE PEACE—*threats of*. Where a party threatens to commit a breach of the peace, the other party can resort to criminal proceedings, and have the party making the threats bound to keep the peace as to person and property. Such threats would not give a court of equity jurisdiction to restrain the party.

5. DISSOLUTION OF INJUNCTION—*assessment of damages*. To confer jurisdiction on the court to hear evidence and assess damages, on the dissolution of an injunction, suggestions in writing should be filed, stating the nature and amount of the damages claimed. The plaintiff should thus have notice of the claim set up against him, and it is error to make the assessment without such suggestions.

6. DAMAGES, ASSESSMENT OF—*evidence to be preserved*. In assessing damages in such cases, it is necessary that the evidence heard on the assessment should be preserved in the record as in other chancery proceedings, and failing to preserve the evidence in the record, there is nothing to sustain the decree for damages, and it will be reversed.

APPEAL from the Circuit Court of Cook county ; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Mr. R. H. FORRESTER, for the appellant.

Mr. D. E. K. STEWART, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

The appellant filed her bill in the circuit court of Cook county, for the purpose of obtaining an injunction against the appellees, on the ground that they had threatened to enter a certain house owned by her, either with or without legal process, and remove certain fixtures in the basement room, which had been placed there for the convenience of parties occupying the room for a saloon, and which were, at one time, owned by Stewart, when a tenant of the appellant.

It is alleged in the bill, that the appellant is the owner of the building, and is in possession by herself and tenants, and that the appellees threaten to enter with force, or to sue out a

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writ of replevin to obtain possession of the fixtures. The property in dispute consists of a counter, ice-box, shelving, gas fixtures, and some few other articles.

The appellant insists, that the fixtures are permanently attached to the building, and form a part of the realty, and can not be removed without doing irreparable injury. It is also alleged, as a ground of relief in a court of equity, that the appellees are insolvent, and that a judgment at law against them would be worthless, and would afford no redress for any damage that might be done to the premises, in case they should be permitted to remove the property.

The appellee McRae filed an answer, in which he admits that the appellant is the owner of the building, and that she was in possession, but claims that he owns the fixtures under a purchase from Stewart, a former owner and tenant of the appellant, and denies, explicitly, they were permanently attached to the building, and that they could not be removed without doing irreparable injury.

The cause having been set by agreement for final hearing on the bill, answer of McRae, and default of Stewart, he having failed to answer, the court having heard the evidence, dissolved the injunction which had previously been awarded, and dismissed the bill for want of equity, and thereupon assessed the damages which the appellees had sustained by reason of the wrongful suing out of the injunction, at the sum of \$200.

The errors relied on for a reversal of this decree are, first, that the court improperly dismissed the bill; and second, that the court proceeded erroneously to assess the damages against the appellant for the wrongful suing out of the injunction.

There is a good deal of evidence in the record, on the character of the property in controversy, whether the fixtures in the saloon part of the house were of that permanent character, and so attached to the building itself as to become, in fact, a part of the realty, or whether they were of that class denominated trade fixtures, which an outgoing tenant, or a purchaser from him, might rightfully remove. In the view

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that we have taken, it will not be necessary to consider that question. The facts present no grounds for relief in a court of equity, and the bill was properly dismissed.

It will be conceded, that it was not lawful for the appellees, or either of them, to enter the premises by force and carry away the property in dispute, against the protest of the party in possession. Controverted titles can not be settled in that way. Such party would have the right to protect his possession, and to use so much force as might be necessary to repel any attack. Equity has never assumed jurisdiction to restrain a mere breach of the peace, or an ordinary trespass, where the injuries, in the nature of things, would not be irreparable.

On the other hand, the appellee McRae had the undoubted right to have his title, whatever it was, tried in the courts, and for that purpose he could employ the writ of replevin to obtain possession of the property. On such trial, the nature of the fixtures could be investigated, whether they were permanently attached to the building, and formed a part of the real estate, or whether they were mere temporary articles, placed there for the convenience of the trade carried on in the building, and which could be properly removed by a tenant, or a purchaser from him. This was his clear, legal right.

It is suggested that the appellees were insolvent, and that a judgment at law against them would be unavailing for any damage that might ensue, in case the fixtures should be wrongfully removed. It would be a singular doctrine to announce, that a party, simply because he was insolvent, could not employ the process of the law to try the title to property which he believes belonged to him, although it might turn out that he was mistaken as to his right.

In this case, before the appellee McRae could make use of the writ of replevin to obtain possession of the property, the statute requires that he should give bond, with security, to the officer who should execute the writ, which would afford the appellant security for the value of the property, in case of its improper execution.

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The title to the property could be better tried in a court of law, and it is not perceived how the facts would authorize a court of equity to assume jurisdiction. The statutory replevin bond, which the party would have to give on commencing his action, would afford complete indemnity for any and all injuries that might ensue to the property of the appellant, on account of the execution of the writ. If the appellees threatened to commit a breach of the peace, and invade the possession of the appellant, resort should have been had to the criminal law, and they could have been required to give bail to keep the peace towards the appellant and her property.

We are of opinion, however, that the court proceeded erroneously in assessing the damages against the appellant on the dismissal of the bill.

It is provided by the statute, that where the temporary injunction has been dissolved, the court, before finally disposing of the case, "upon the party claiming damages by reason of such injunction, suggesting in writing the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain." Laws 1861, sec. 1, p. 133.

It is necessary, to confer jurisdiction on the court to hear evidence, and determine the question of damages according to right, between the parties, that suggestions in writing should be filed, stating the nature and amount of damages claimed. How else shall the opposite party know what injury he hath sustained? It is agreeable to the practice in all our courts, that a party shall not be mulcted in damages until he shall first have had an opportunity to be heard in his defense, after the nature of the demand has been stated against him in court. Any other rule would be unreasonable.

In cases like the one at bar, the party against whom the decree is sought, should have a reasonable opportunity to produce evidence to rebut the supposed claim for damages.

It does not appear that any suggestions in writing stating the nature and amount of damages sustained by the appellees by

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reason of the injunction, were filed in the cause, and because of that omission, it was error in the court to make any assessment.

No evidence is preserved in the record on the question of damages, and consequently there is nothing to sustain the decree in making the assessment, if the proceedings were otherwise regular. The evidence upon such an issue should be preserved, the same as upon other questions involved in the case, on which relief is sought, or the decree can not be supported.

The decree of the circuit court, dissolving the injunction and dismissing the bill, is affirmed, and that part of the decree assessing damages against the appellant, is reversed, and the cause remanded.

The entire costs in this court will be taxed against the appellee McRae, for the reason that it was on his behalf that the damages were assessed.

*Decree modified.*

S. S. RUSSELL

v.

WILLIAM L. HUBBARD *et al.*

1. ADMINISTRATION OF ESTATES—*recovery can not exceed the account filed.* Where a party presents an account against an estate, he is limited in his recovery by the amount claimed, as much as a plaintiff is by the *ad damnum* in his declaration.

2. SAME—*of costs against an estate.* Estates are not answerable for costs on claims filed after the term of the probate court appointed by the administrator for adjustment.

3. SAME—*of costs against an administrator personally.* An administrator can never be made personally liable for costs except upon proof of *mala fides* or gross negligence on his part.

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4. *SAME—effect of the two years' limitation—of the judgment.* Where a claim against an estate was not filed until after the expiration of two years from the granting of letters, the judgment therefor can only be paid out of subsequently discovered assets, and which had not been inventoried and accounted for; and in that regard, the judgment should be special, and not general.

5. *REMITTITUR—when and how to be made.* A remittitur written in a bill of exceptions after the term at which the judgment was rendered, and in vacation, will not operate to cure an error in the judgment in respect to the matter attempted to be remitted. The remission, to have that effect, should be made during the term of the court, and while the judgment is under its control.

6. *LICENSE to use a wall in building—whether revocable.* Where the owner of a lot of ground contemplated the erection of a frame building thereon, the owner of a brick house situated on the line of an adjacent lot proposed to him that if he would build of brick he might use the brick wall of the house for the purpose of attaching thereto the proposed new building. The proposition was accepted, and the new house was built of brick and attached to the wall of the other building, as suggested: *Held*, that while the license to use and attach to the wall might have been revoked prior to the execution of the purpose of the license, yet, after its execution by the expenditure of money in the erection of the new building, as induced by the permission, the license was irrevocable.

7. *SAME—of the rights of grantees of the respective parties.* The party to whom the license was granted having availed thereof by the erection of his building and attaching to the wall as proposed to him, his subsequent grantee would succeed to his equitable rights in respect thereto.

8. And the party granting the license being estopped from its revocation by reason of its being executed, the conclusive effect of the estoppel would embrace privies as well as parties, and preclude all who claim under the person originally barred.

9. *SAME—statute of frauds.* And in such case, the execution of the parol permission would supply the place of a writing, and take the case out of the statute of frauds.

10. *COVENANT—of a voluntary payment by the covenantes in respect to the matter embraced in the covenant.* Where the party to whom the license was given, and who had executed its purpose, subsequently conveyed with covenant to his grantee against any damages resulting to the latter in respect to the matter of such license, such grantee can not, by voluntarily yielding to a claim based upon an alleged right to revoke the license when such right of revocation did not exist, have any right of action upon the covenant.

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APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. HANNAMAN & KRETZINGER, for the appellant.

Messrs. WILLIAMS & CLARK, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

On the 1st day of February, 1860, Furry, since deceased, conveyed to appellees a lot of ground, and the deed contained the following special covenant: "Whereas, the building located on the premises hereby conveyed, is adjoining and attached to a brick building, formerly owned by Daniel Harman, and the north wall thereof being used as the south wall of the building hereby conveyed, the said party of the first part hereby expressly covenants, to and with the said party of the second part, to indemnify, protect and save harmless from all injury, loss or damages, from the connection of the buildings in the manner aforesaid, from any and all claims from said Harman, or his heirs, administrators or assigns, preferred therefor."

Furry died in 1864, and on the 22d day of February of that year, letters of administration were granted to appellant.

The claim for damages for breach of the covenant, was not filed in the county court until in November, 1867.

The term fixed by the administrator for the adjustment of claims, was in April, 1864.

It was admitted that Harman mortgaged his lot to one Locke, and that the mortgagee had acquired title by a decree of foreclosure, and sale and deed thereunder, and that appellees had conveyed their lot to Anderson & Co.

Locke claimed \$250, as damages for breach of the covenant. This amount was paid to him by Anderson & Co., and appellees paid to them the same amount, and now seek to recover it from the estate of the deceased. The claim filed by them, was for only \$206, while the judgment rendered was for \$288.65.

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There are numerous errors, for which the judgment must be reversed.

The claim was not filed at the term selected by the administrator for adjustment. In such case the statute requires that a copy of the claim shall be filed with the clerk, with an order for summons to the administrator to defend the claim. It is also made the duty of the clerk to provide a "Judgment Docket," in which he shall enter the name of the claimant, and the amount of the note or account. (Sess. Laws of 1859, p. 93.)

The judgment should only have been for the amount of the account filed, with interest from the 15th of November, 1867, the date of the payment by appellees. The court evidently rendered judgment for \$250 dollars and accrued interest.

By the fair construction of the statute, the claimant is limited in his recovery, by the amount claimed, as much as a plaintiff is by the *ad damnum* in his declaration. The law requires the amount to be filed and docketed, so that the administrator may consent to its allowance, and avoid the expense of litigation. Wherefore the necessity of these requirements, if a larger amount may be proved and recovered? Some effect must be given to the statute, and it would have none if the practice indulged by the court below were followed.

The court rendered judgment against appellant for all costs, both in the circuit and county courts. The statute expressly provides that estates shall be answerable for costs on claims filed at or before the term selected for adjustment, but not after. The claimant had selected his forum, and the statute must control. Its language is imperative, in its application to this case, that the estate was not liable for the costs incurred in the county court.

The attempt to enter a *remittitur*, as to the costs, does not cure the error. The judgment was rendered at the June term. In October following, and in vacation, when the judge was



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about to sign the bill of exceptions, he inserted therein a written *remittitur* of the costs. This did not thereby become a part of the judgment. It stands in full force, as originally rendered. The remission should have been made during the term of the court, and while the judgment was under its control. *Rowan v. The People*, 18 Ill. 159.

The judgment is erroneous in another respect. Execution was awarded against the administrator, and judgment for the damages and costs was made absolute against him. This was manifest error.

There was no proof of *mala fides* or gross negligence on the part of the administrator, and in the absence of such evidence he never can be made personally liable for costs. Ordinarily, the judgment should be against the goods and chattels of the deceased, in the hands of the administrator to be administered. In this case, as the claim was not filed within two years from the granting of letters, the judgment could only have been for the amount due, to be paid out of subsequently discovered estate, and which had not been inventoried and accounted for. The judgment should have been special, and not general. *Thorn v. Watson*, 5 Gilm. 26; *Judy v. Kelly*, 11 Ill. 211; *Peacock v. Haven*, Adm'r, 22 Ill. 23; *Greenwood v. Spiller*, 2 Scam. 504; *Welsh, Adm'r, v. Wallace*, 3 Gilm. 490; *Peck, Adm'r, v. Stevens*, 5 Gilm. 127.

But could Locke, as the assignee of Harman, have any benefit of this covenant in the deed from Furry to appellees?

The covenant recognizes the title in Harman to the lot on which was situated the division wall, and his claim for damages as well as his assigns. Locke, then, having acquired title by virtue of his mortgage and foreclosure, sale and deed thereunder, had the paramount title.

The proof, however, shows an equity in Furry and his grantees, which can not be disregarded.

From the special covenant, it clearly appears that the house had been erected by Furry, prior to his deed to appellees. He had intended to build a frame house, and Harman agreed that

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he should have the use of the wall, if he would build of brick. In pursuance of this agreement, a brick building was erected, and the north wall of Harman's house was used as the south wall of Furry's building. Locke's mortgage was not executed until fifteen days after the date of the deed to appellees, so that, prior to the execution of the mortgage, Furry had the use and enjoyment of the wall, and his grantees succeeded to his equitable rights.

By virtue of this agreement, and the erection of the building, equitable rights were acquired. Though the license to use and enjoy the wall might be revoked prior to its execution, after execution, a different question arises, and the possession was constructive notice to the purchaser, of the rights which had been acquired.

Money had been expended upon the faith of the license, and a different and more expensive building erected.

While, ordinarily, it may be true that a parol license of this character is not transmissible, may be revoked at pleasure, and extinguished by alienation of the land, yet, where money or labor has been expended, the law will interpose to protect the licensee. The revocation, under such circumstances, would be fraudulent, and compensation in damages would afford no adequate redress. In such case, the execution of the parol permission would supply the place of a writing, and take the case out of the statute of frauds.

It would be the boldest fraud to allow this permission to be revoked. The grantee of Harman was chargeable with notice of Furry's equity, at the time he took the mortgage, and he stands in the place of his grantor, and is liable to the same equity. The license has been acted upon, and the parties can not be restored to their original position.

Locke is estopped from revoking the license, or claiming damages for the use of the wall, and appellees were not bound, and had no right, to pay the \$250, and make such payment the basis of a claim against the estate of Furry. If this could

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be done, then he could oust appellees from the possession of the wall.

All the elements which constitute an estoppel, exist in this case. The conclusive effect of an estoppel embraces privies as well as parties, and precludes all who claim under the person originally barred. The erection of the particular building was induced by the agreement; it was relied upon, and pecuniary injury must follow, if it is allowed to be controverted.

This rule must apply as well at law as in equity. *King v. The Inhabitants of Batterson*, 6 T. R. 554; *Copeland v. Copeland*, 28 Maine, 525; *Shaw v. Beebe*, 35 Ver. 205.

We hold that the permission to attach to this wall, after its erection and the expenditure of such an amount of money, is irrevocable, and that privies, as well as parties, are estopped.

In the case of *The Ameriscoggin Bridge v. Bragg*, 11 N. H. 102, it was held that a license to build and maintain a bridge on another's land, might be proved by parol, and that the license was either irrevocable, or could only be revoked upon payment of compensation and damages.

In the case of *Swartz v. Swartz*, 4 Barr. 353, it was held, upon facts somewhat analogous to the facts of the case at bar, that a parol license was binding by delivery of possession. See also *Rerick v. Kern*, 14 Serg. & Rawle, 267.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

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PASCHAL P. MATHEWS *et al.*

v.

GEORGE COWAN *et al.*

1. SALE OF CHATELS—*delivery—trover—case*. Where a person sold to another a quantity of flour, for cash, to be delivered by a particular day, and a portion was delivered and paid for previous to that day, and the balance was delivered on the last day for delivery, which was on Saturday,

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and on its delivery the purchaser drew a check on a bank, but on being presented on the same day, it was dishonored, and the declaration avers that the delivery was obtained by fraud, on a trial in such a case, it is error to instruct the jury that if there was such fraud as would allow the seller to maintain trover or case against the buyer and his partner who held the flour, a design to defraud the seller must have existed when the purchase was made.

2. **CONTRACT—minor.** Where a minor makes such a purchase, and procures the delivery by fraud, he will be liable as in tort. The mere fact that he made the contract, and by fraudulent means obtained possession of the property, will not shield him from liability to suit, in case or in trover.

3. **CHECKS—fraudulent.** Where a person draws a check on a person in whose hands he has no funds, and who, he has no reason to believe, will honor the check, the drawer is guilty of a fraud, and in such a case as the present, it is error to refuse to so instruct the jury.

4. **SALE—payment.** Where property is sold, to be paid for on delivery and it is delivered, and the purchaser, refusing to make payment, appropriates the property to his own use, trover will lie. In such a sale, payment is a condition precedent; but if the seller deliver fully and unconditionally, he thereby waives the condition of precedent payment, and the right of property passes to the purchaser; but if there is no waiver, it is otherwise, and the rule does not apply where the goods are delivered with the expectation of simultaneous payment, and the purchaser holds the property and refuses to pay—that amounts to a conversion. A check not drawn against funds, is not payment; it is received but as a means of payment.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Messrs. DENT & BLACK, for appellants.

Messrs. HERVEY, ANTHONY & GALT, for appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on the case, with a count in trover, brought by the appellants against the appellees, for the conversion of three hundred barrels of flour delivered to the latter by the former, December 3d, 1870, as upon a sale for cash, but not paid for, the appellees having given therefor a check for \$1473, on the Manufacturers' National Bank of Chicago, which check was dishonored, and by reason of such dishonor,

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Opinion of the Court.

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and the insolvency of the appellees, the flour being lost to appellants.

The special count in the declaration alleges, in substance, that on the 3d day of December, 1870, the defendants, knowing themselves to be insolvent, but wrongfully intending to defraud the plaintiffs of the flour, fraudulently induced the plaintiffs to deliver the same to defendants, on the false and fraudulent pretense of the latter that they would pay therefor on delivery; in pursuance of which false and fraudulent pretense, defendants drew said check, payable on demand, and fraudulently and deceitfully delivered it to plaintiffs, as and for a good check, the defendants knowing that it was not good and would not be honored; that the check was dishonored, defendants having no funds in bank to meet it, and was and is worthless, whereby the flour became lost to plaintiffs, etc.

On the trial, evidence was introduced of the delivery of three hundred barrels of flour to the defendants, on December 3d, 1870, being Saturday; that the sale was for cash; that this delivery completed the delivery of five hundred barrels, sold by plaintiffs to defendants, November 23d, 1870, two hundred of which had been previously delivered and paid for; that on the delivery, Haven, one of the defendants, promised to give a check for the three hundred barrels on 'change, (lasting from eleven A. M. to one P. M.,) but that the check was delivered at plaintiff's office at 2:30 to 2:40 that afternoon; that it was dishonored, and on seeing Cowan, the other defendant, the next Monday morning, the latter said, Haven knew their checks were thrown out at one P. M. Saturday. Cowan and Haven were in partnership, and there was evidence that no assets could be found, and tending to show the insolvency of the defendants.

The following instruction was given for the defendants, and excepted to:

"The jury are instructed, that it is the intention of the defendant, Haven, when he bought this flour of the plaintiffs,

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on the 23d day of November, that is, whether he expected or intended to pay for the flour when he bought it, or whether he intended to cheat the plaintiffs out of it, which is to determine the defendant Haven's liability in this case, and not what transpired on the 3d day of December, when this check was given; and if the jury find, from the evidence, that Haven was a minor, and bought this flour in good faith, and in the usual course of business, and with a reasonable expectation of paying for the same, then the jury should find the defendant Haven not guilty; and in determining the question of intent, it is proper the jury should take into consideration what transpired subsequently in the said Haven's business, between the purchase of this flour and the day this check was given; and if the jury should find, from the evidence, that the defendant Haven bought a large amount of flour from other parties after he bought this of plaintiffs, and before this check was given, and that he paid for the same, and that he paid for two hundred barrels of this same purchase, for the balance of which this suit is brought, the jury have a right to take this into consideration in determining whether the defendant Haven expected and intended to pay for this flour when he bought it of the plaintiffs."

The following instruction, without the italicized words in it, was asked for by the plaintiffs, and refused, which was excepted to, and thereupon the court, of its own motion, inserted in it the words italicized, and, as thus modified, gave it to the jury; to which the plaintiffs excepted:

"There are two issues presented in this case. One relates to the merits of the suit, and upon it the verdict should be for the plaintiffs, if the jury believe, from the evidence, that the plaintiffs were in possession of the three hundred barrels of flour in question, as of their own property, and that the defendants, Cowan & Haven, being insolvent and knowing themselves to be insolvent, *with the fraudulent intention, at the time, of cheating the defendants out of said flour, contracted with*

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Opinion of the Court.

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*the defendants for the flour, and procured plaintiffs to deliver said flour to them on the false pretense that the defendants would pay for the same on delivery ; and if the jury further believe, from the evidence, that the defendants, in pursuance of such fraudulent intention, gave to the plaintiffs in payment for the same, the check in question, as and for a good check, knowing the same to be drawn without funds in-bank to meet the same, and without any reasonable or well grounded expectation that the same would be paid ; and if the jury further believe, from the evidence, that the defendants wrongfully, or under such circumstances as are above stated, converted the property to their own use, so that the same became lost to the plaintiffs."*

Among the errors assigned, are the giving of the foregoing instructions, with others of like import. They are erroneous, in requiring that the supposed fraud should have been meditated at the time of the contract for the purchase of the flour, on the 23d day of November. That is not the case made by the declaration. It complains of no fraud as practiced, or intended, at the time of making the contract of purchase, but only charges, that on the 3d day of December, the delivery of the flour was obtained by fraudulent contrivance. There might have been entire fairness in the making of the contract to purchase on the 23d of November, and an honest purpose then to pay for the flour on delivery ; and yet, on the 3d day of December, a gross and actionable fraud might have been practiced in getting possession of the flour without paying for it, under a fraudulent pretense of doing so.

The position is taken by the appellee's counsel, that the basis of the action was a contract, and that, as Haven was an infant, he is exempt from liability ; and a class of authorities is cited to the effect, that though, for mere torts, an infant is legally liable as an adult is, the fraudulent act to charge him must be wholly tortious ; and a matter arising *ex contractu*, though infected with fraud, can not be changed into a tort in

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order to charge the infant in trover or case, by a change in the form of the action.

But we do not regard this case as one at all embraced within the scope of those authorities. Although it arose in the carrying into execution a contract, the transaction, as here complained of, was not really a contract, but we must regard it as a mere tort; and so long as an infant is held responsible for his torts and frauds, we must hold him responsible in damages upon the facts set out in the special count of the declaration.

Error in giving the above instructions, we deem sufficient ground for reversing the judgment, which was for the defendants.

The instructions in the case, given and refused, are voluminous, which it is not thought worth while to consider severally.

In particularizing the above, however, we would not be understood as impliedly sanctioning the others that were given for the defendants, or the refusal of other ones asked by the plaintiffs.

For instance, those asked by the plaintiffs, asserting the right of recovery in case the check was given, knowing it not to be good, we think should have been given. Such conduct would have amounted to a fraud and imposition upon the plaintiffs, which the defendants should not take advantage of, to hold the property as against the plaintiffs, on the plea of infancy in Haven, who gave the check, or that Cowan did not participate in the transaction—the flour having gone to the use of the partnership.

And we perceive no substantial objection to the instruction asked by plaintiffs, allowing a right of recovery under the count in trover, without reference to any intentional fraud, in case the sale was for cash, and the defendants appropriated to their own use the flour, without payment of the price, and without any waiver by plaintiffs of the condition of payment on delivery.



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Opinion of the Court.

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In the case of a sale for cash, the payment of the price is a condition precedent, implied in the contract of sale. If the seller does deliver freely and absolutely, and without any fraudulent contrivance on the part of the buyer to obtain possession, and without exacting or expecting simultaneous payment, the precedent condition of payment is waived, and the right of property passes. But Mr. Chancellor KENT says, this rule is understood not to apply to cases where payment is expected simultaneously with delivery, and is omitted, evaded or refused by the vendee, on getting the goods under his control; for the delivery, in such case, is merely conditional, and the non-payment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have a right, instantly, to reclaim the goods. 2 Kent Com. 666.

A check is always supposed to be drawn upon a previous deposit of funds, Story on Prom. Notes, sec. 489,—the giving of the check was not payment of the money; the taking of it was but as a means of obtaining the money. *King v. Strong*, 35 Ill. 9. And being utterly futile to that end, the purchase price was not paid, and we are of opinion the precedent condition of its payment was not waived by the delivery under such circumstances, and that, as between buyer and seller, the property never passed from the plaintiffs to the defendants, and the appropriation of the flour by the defendants, to their own use, was a conversion of the plaintiffs' property. See *Tyler v. Freeman*, 3 Cush. 261; *Hill v. Freeman*, *ibid.* 257.

The judgment is reversed and the cause remanded.

*Judgment reversed.\**

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\*ELEAZER W. DENSMORE *et al.* v. GEORGE COWAN *et al.*

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Per CURIAM: The facts in this case are substantially the same as in the preceding case of *Mathews et al. v. Cowan et al.*

The decision in that case must control this.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

MARTIN O. WALKER

v.

HUGH MARTIN.

NEW TRIAL—*verdict against the evidence.* In this case the evidence was regarded as sufficient to sustain the verdict.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Messrs. JEWETT, JACKSON & SMALL, for the appellant.

Mr. GEORGE W. BRANDT, for the appellee. ,

PER CURIAM: This case has been already twice before this court, and the judgment was each time reversed on the ground of excessive damages; 43 Ill. 508; 52 ib. 347. On the first trial, the jury returned a verdict for \$20,000, and on the second, for \$25,000. On the last trial, there was a verdict for \$6000; and to avoid a new trial, a *remittitur* for \$1000 was entered, and the court gave judgment for \$5000. The record is again brought here by the plaintiff; but the only ground upon which the former judgments were reversed, is now removed. The record presents simply issues of fact which have been passed upon by the jury; and the evidence being very conflicting, there is no reason for setting aside the verdict.

*Judgment affirmed.*

## Syllabus.

GIBHERD FENT *et al.*

v.

## THE TOLEDO, PEORIA, &amp; WARSAW RAILWAY CO.

1. **DEMURRER TO EVIDENCE**—*what is admitted thereby.* Where a demurrer is interposed to the evidence, the rule is, that the demurrer admits not only all that the plaintiff's testimony has proved, but all that it tends to prove.

2. **REMOTE AND PROXIMATE CAUSE**—*of the rule and its application.* If fire is communicated from a railway locomotive to the house of A, and thence to the house of B, it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B, but that is a question of fact, to be determined in each case by the jury under the instructions of the court.

3. The rule is, to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire.

4. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

5. In this case, which was an action against a railway company to recover for the loss of the plaintiff's house by fire, alleged to have been occasioned by the negligence of the company, it appeared that a locomotive, with a train of freight cars, belonging to the defendant, in passing eastwardly through a village, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of plaintiff, situated about two hundred feet from the warehouse, and destroyed it. It was held, the company was not exonerated from liability merely because the plaintiff's house was set on fire, not immediately by cinders

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thrown from the locomotive, but by the burning of another house. The case was one calling for the application of the rule before announced, the liability of the company depending upon the question whether the second house was so near the first that, in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected.

6. *SAME*—*how the rule affected by the extent of loss to the wrong doer.* The propriety of the rule for determining what is a proximate cause of the injury in such a case, can not be affected by considerations as to the extent of liability to which railway companies might be thereby subjected, even to producing bankruptcy, and compelling them to suspend their operation.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES H. WOOD, Judge, presiding.

Messrs. STRAIGHTS, YOUNG, HARDING & PAYSON, for the appellants.

Messrs. INGERSOLL & McCUNE, for the appellee.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

On the 1st of October, 1867, a locomotive, with a train of freight cars, belonging to the appellee, in passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of plaintiffs, situated about two hundred feet from the warehouse, and destroyed it and most of its contents. To recover damages for this loss, the plaintiffs have brought this suit.

The defendant in the circuit court demurred to the plaintiffs' evidence, and the court sustained the demurrer. To reverse this judgment, the plaintiffs bring up the record.

The evidence shows great negligence on the part of defendant, but it is unnecessary to discuss this question. Where a

## Opinion of the Court.

demurrer is interposed to the evidence, the rule is, that the demurrer admits not only all that the plaintiffs' testimony has proved, but all that it tends to prove. In this case, therefore, the defendant's negligence must be regarded as admitted. It is not, indeed, controverted, but the counsel rely for defense solely upon the ground that the plaintiffs' building was not set on fire directly by sparks from the defendant's locomotive, but by the burning of the intermediate warehouse, and that therefore the defendant is to be held harmless, under the maxim "*causa proxima, non remota, spectatur.*"

There are not many of the maxims of the law which touch so closely upon metaphysical speculation. The rule itself is one of universal application, but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate, and when merely remote. Greenleaf, in the 2d volume of his Evidence, sec. 256, lays down the rule that "the damage, to be recovered, must always be the *natural and proximate consequence* of the act complained of." But this seems little more than the substitution of one form of general expression for another.

Parsons, in his work on Contracts, vol. 2, page 456, 1st ed., after alluding to the confusion in which the adjudged cases leave this question, says: "We have been disposed to think that there is a principle derivable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is, that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration." We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by Pollock, C. B., in *Higby v. Hewitt*, 5 *Rich.* 240.

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The counsel upon both sides have furnished us with a very elaborate review of the decided cases. We have not the time, and it would be an unnecessary labor, to go over them in detail.

With the exception of two recent cases decided in this country upon the precise question before us, it can not be denied that the great current of English and American authorities would bring the defendant in this case within the category of proximate causes. The great effort of the counsel for defendant has been to explain away, as far as possible, the effect of these authorities, and to draw a distinction between them and the case at bar. However successful they may have been in showing a difference between some of the cases cited by appellants' counsel and that under consideration, on the other hand, they cite no English case, and but two American cases, in which a wrong doer has been excused from liability under circumstances analogous to those disclosed by this record, on the ground that he was a remote, and not a proximate, cause of the injury done.

From the oft-quoted squib case of *Scott v. Shephard*, 2 W. Black. 892, down to our own day, the English reports abound with instances in which causes more remote than the cause in this case, have been held sufficiently direct and proximate to be made a ground of damages. As illustrative of this, we content ourselves with citing *Midge v. Goodwin*, 24 E. C. L. 272, *Lynch v. Mudin*, 41 E. C. L. 422, *Ridgely v. Hewitt*, *ubi supra*, *Greenland v. Chaplin*, 5 Exch. 243, and *Montoyer v. London Insurance Co.*, 6 Exch. 451. In this last case, the defendant had insured the plaintiff's tobacco against perils of the sea. Hides were shipped in the same vessel. The vessel shipped sea water, which, coming in contact with the hides, caused them to ferment. The fermentation created a noxious vapor which acted on the tobacco and spoiled its flavor. Suit was brought against the company, and the defense was the same relied upon in this case. The court held the defendant responsible, and said in its opinion: "The sea

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Opinion of the Court.

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water having caused the hides to ferment, and thereby the tobacco to be spoiled, it is merely playing with terms to say the injury is not occasioned by the sea water. The action of the sea water, which had been shipped in consequence of bad weather, occasioned the fermentation, and is the proximate cause."

If we turn to the American courts, we shall find the general current of authorities to be in harmony with the English precedents. A late case, and one in which a cause much more remote than the fire from the locomotive in the case before us, was held the proximate cause, is *Tweed v. Insurance Co.*, 7 Wallace, 44. It was an action brought against an insurance company to recover for cotton stored in a warehouse, and insured against fire, except loss by fire caused by explosion, invasion, etc. An explosion occurred in another warehouse, from which explosion fire was communicated to the Eagle Mills, situated on the opposite diagonal corner, and from thence to the warehouse in which the cotton was stored. In the circuit court a judgment was obtained against the company, on the ground that the immediate cause of the loss was the fire from the Eagle Mills, and the case was not, therefore, within the exception of the policy. This would seem not an unreasonable view, but the Supreme Court of the United States reversed the judgment, and in delivering their opinion, use the following language: "One of the most valuable of the *criteria* furnished us by the authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief, the other must be considered too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another mill, supplies no new force or power which caused the burning."

That case was far stronger for the plaintiff than the one at bar is for the defendant.

*Powell v. Deveney*, 3 Cush. 300, and *Vandenburg v. Truax*, 4 Den. 464, are cases in which the court went back further for the proximate and responsible cause than we are asked by the plaintiff to go in the present instance.

The case of *Hart v. Western Railroad Co.* 13 Metc. 99, presented precisely the same question with that before us. The locomotive set fire to a shop, and the fire crossed the street and destroyed a dwelling house. The court held the company liable.

In *Perley v. Eastern Railway Co.* 98 Mass. 414, a similar judgment was pronounced upon a similar state of facts.

Counsel for appellee seek to weaken the authority of these cases by adverting to the fact that they were decided under a statute of Massachusetts making railway companies liable for all losses by fire communicated from their locomotives, and authorizing them to insure against such risks. But the statute does not in the least degree affect the common law principle under consideration, and was not so regarded by the court in these decisions. It simply makes the companies liable for fires caused by them, irrespective of the question of negligence. But if the locomotive was the remote, instead of the proximate cause, in the sense of the maxim we are now discussing, there would have been no liability under the statute any more than at common law. Upon this question of cause, the cases are as much in point as if there had been no statute. The court, in the last case, in discussing this very objection, that the cause was not proximate, say: "The fact, therefore, that the fire passes through the air, driven by a high wind, and that it is communicated to the plaintiff's property from other intermediate property of other men, does not make his loss a remote consequence of the escape of the fire from the engine." And in another part of the opinion we find the following language: "If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance



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against which it strikes, is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet fired from the train passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances."

In *Cleveland v. Grand Trunk Railway Co.* 42 Ver. 449, a like rule was applied, without discussion, to similar fires occasioned by locomotives.

The same rule has also been enforced in two recent English cases. *Piggott v. The Eastern Counties Railroad Co.* 54 E. C. L. 229, and *Smith v. The London & S. W. Railroad Co.* 5 Law Rep. Com. Pleas, 98. In the first case, the fire was communicated from the first building destroyed to several other frame buildings belonging to the plaintiff. He was allowed to recover, and the counsel for the company obtained a rule *nisi* for a new trial. The rule was subsequently argued before the common pleas, and discharged, all the judges concurring. The precise point under consideration was not ruled by the court, and we cite the case because the question of proximate cause seems never to have occurred to the counsel or court, all of whom bore names familiar to the profession. It was not suggested that a recovery could not be had for all the buildings as well as for that immediately set on fire by the locomotive.

In the last case, the servants of the railway company had cut the grass, trimmed a hedge bordering the railway, placed the trimmings and grass in heaps near the line, and allowed

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them to remain there fourteen days during very hot weather, in the month of August. Fire from a passing engine ignited one of these heaps, burned the hedge, and was thence carried by a high wind across a stubble field and a public road and burned the plaintiff's cottage, situate two hundred yards from the railway. There was no evidence of negligence in the construction or management of the engines, the negligence alleged consisting in leaving the hedge trimmings in dry weather near the railway line, where they would be liable to be ignited. There was a verdict for the plaintiff, and leave given to the defendants to move for a nonsuit. On the argument of the motion before the common pleas, it was contended, in support of the rule, that the defendants' servants cut the grass and trimmed the hedge in the ordinary course of their duty, and but for the great heat of the weather, and the high wind prevailing at the time of the fire, a combination of circumstances which the defendants could not have foreseen, the burning of the cottage would not have occurred.

It was urged that this was a result which no reasonable person could have anticipated. This was a very far weaker case against the company than the one at bar, and the position of the counsel for the defendant was adopted by one of the judges. But the other members of the court were of opinion the evidence sustained the verdict, and they discharged the rule.

The chief justice, in giving his opinion, uses the following language: "It is said no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble field and a public road, and so reach a building at the distance of two hundred yards from the railway. But seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible

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materials, and that the fire did, in fact, extend to the cottage, I think it impossible to say there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were, was the natural consequence of their negligence; what the defendants' servants ought, as reasonable men, to have contemplated as the result of leaving the accumulation of cuttings and trimmings where and as they did, must depend on all the circumstances."

Counsel for appellee rely upon three adjudged cases in support of the decision of the circuit court. The first is *Marble v. Worcester*, 4 Gray. That was a case in which it was sought to recover damages from the city by a person who had been thrown down and injured by a horse that had become frightened, freed himself from the vehicle to which he was attached, and run away. The recovery was sought against the city on the ground that the horse had been frightened by the striking of a vehicle against a defect in the highway. The plaintiff had nothing to do with the horse, and was fifty rods distant. The facts presented the question of proximate cause in a difficult and very debatable form, but it was held, by a divided court, that the city was not liable. The case bears but a faint analogy to the present one, and the subsequent case in 98 Mass., above cited, shows that the decision in *Marble v. Worcester* was not considered by the court that pronounced it as bearing upon the question presented by this record.

✓ We now come to the two cases chiefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 214, and the other is *Kerr v. The Pennsylvania Railroad Co.*, decided by the Supreme Court of Pennsylvania, at its May term, 1870. These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question.

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As we understand these cases, they hold that, where the fire is communicated by the locomotive to the house of A, and thence to the house of B, there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first. The principle laid down by these authorities and urged by counsel in this case is, that, in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property. With all our respect for these courts, we can not adopt this principle, and it is admitted by the judges who delivered the opinions to have no precedent for its support, and to be absolutely in conflict with former adjudications. Indeed, only one year prior to the decision in New York, the same court, in *Field v. New York Central Railroad Co.* 32 N. Y. 345, pronounced a judgment which we can not reconcile with the later case.

It has often been held by this and various other courts, that, if fire is communicated to the dried grass of an adjoining field, through the carelessness of the persons managing a railway locomotive, and spreads over the field, no matter to what extent, destroying hay stacks, fences and houses, the company is liable. The correctness of these decisions is not assailed by appellee's counsel, and we have no doubt the same rule would be applied by the courts that decided the cases upon which counsel rely. But if these two decisions, in New York and Pennsylvania, are correct law, it must be held that, if fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, while A must be reimbursed by the company, B must set his loss down as due to a remote cause, and suffer in uncomplaining silence. Would there not be, in such a decision, a sense of palpable wrong, which would justly shock the public conscience and impair the confidence of the community in the administration

of the law. While the law to be administered by the courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expression of a masculine common sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the schoolmen. If the field of A contains forty acres, and the whole is overrun by fire, he may recover for the whole. But if A owns twenty acres next to the railway, and B the remaining twenty acres of the same field, A shall recover, according to the doctrine of these cases, but B shall not. Yet, the test question is, what is the proximate cause of the fire, and this ruling makes the proximate cause depend upon whether the field of forty acres is owned by one person or by two.

Let us suppose another case. Both these opinions, upon which we are commenting, expressly admit, as both courts have decided, that if, through the negligence of a railway company, fire is communicated to the building of A, he may recover. But suppose the building is a wooden tenement, one hundred feet in length, extending from the railway. In the Pennsylvania case, the second building was only thirty-nine feet from the first. We presume that court would hold, and appellee's counsel would admit, that A might recover for the value of his entire building, one hundred feet in length. But suppose B owns the most remote fifty feet of the building. Could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any court or text writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be "the natural and proximate consequence of the act complained of." Is not the burning of the second fifty feet of the building in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building as well as for

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the first, when there is one continuous building, and whether owned by one person or by two, is it possible that, when the second fifty feet is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other, there can be no recovery? Is not the burning of the second building still "the natural and proximate consequence of the act complained of?" It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

The Court of Appeals in New York, and the Supreme Court of Pennsylvania, seem, from their opinions, to have attached great weight to an argument urged upon us by the counsel for appellee, and indeed that argument seems to have been the chief reason for announcing a rule which both courts struggle in vain to show is not in conflict with all prior adjudications.

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That argument is, in brief, that an entire village or town is liable to be burned down by the passing of the fire from house to house, and if the railway company, whose locomotive has emitted the cinders that caused the fire, is to be charged with all the damages, these companies would be in constant danger of bankruptcy, and of being obliged to suspend their operation. We confess ourselves wholly unable to see the overpowering force of this argument. It proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrong doer.

As a question of law or ethics, the proposition does not commend itself to our reason. We must still cling to the ancient doctrine, that the wanton wrong doer must take the consequences of his own acts, whether measured by a thousand dollars or a hundred thousand.

As to the railroads, however useful they may be to the regions they traverse, they are not operated by their owners for benevolent purposes, or to promote the public welfare. Their object is pecuniary profit. It is a perfectly legitimate object, but we do not see why they should be exempted from the moral duty of indemnification for injuries committed by the careless or wanton spread of fire along their track, because such indemnity may sometimes amount to so large a sum as to sweep away all their profits. The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or the guilty. If, in placing it where it belongs, the consequence will be the bankruptcy of a railway company, we may regret it, but we should not, for that reason, hesitate in the application of a rule of such palpable justice.

But is it true that railroads can not thrive under such a rule? They have now been in operation many years, and extend over very many thousand miles, and we have never yet heard of town or village that has been destroyed by a fire ignited by their locomotives. Improved methods of construction, and a vigilant care in the management of locomotives,

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have made the probability of loss from this cause so slight that we can not but regard the fears of the disastrous consequences to the railway companies which may follow from an adherence to the ancient rule, as in a large degree chimerical. A case may occur at long intervals in which they will be required to respond in heavy damages; but better this, than that they should be permitted to evade the just responsibilities of their own negligence, under the pretence that the existence of the road may be endangered. It were better that a railway company should be reduced to bankruptcy, and even suspend its operations, than that the courts should establish for its benefit a rule intrinsically unjust, and repugnant not merely to ancient precedent, but to the universal sense of right and wrong.

Our position on this subject is briefly this: We do not desire to impose upon the railway companies unreasonable obligations, or to subject them to unreasonable danger of great pecuniary loss. We do not wish to make them insurers against all damages by fire that may result from the passage of their trains, without reference to the question of remote and proximate cause. But, on the other hand, we do insist on applying to them the same rule that has been held through all the administration of the common law, with the exception of the two cases upon which we have been commenting. As already stated, we understand the doctrine of those two cases, and the position of counsel for appellee to be, that, if fire is communicated from a locomotive to the house of A, and thence to the house of B, it is a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause, of the injury to B; and the railway company is, for this reason alone, to be held not responsible. This rule we repudiate as in the teeth of almost numberless decisions, and as unsupported by that reason which is the life of the law.

We hold, on the contrary, as we held in reference to this same fire in the case of *The T., P. & W. R. R. Co. v. Pindar*, 53 Ill. 451, that it is in each case a question of fact, to be



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determined by the jury under the instructions of the court. Those instructions should be, in substance, what we have already stated. If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue, the company is to be held responsible, if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.

In the case before us, owing to the distance of the plaintiff's building from the one first set on fire, this question might not have been one of easy determination. The defendant, however, thought it better not to take the risks of this issue, but, by a demurrer to the evidence, to rest his defense upon the theory that, even admitting all that the evidence tends to prove, there is still no liability.

In this court, the counsel for the company have not discussed the evidence. They place the case on the single ground, that the company is free from liability, because the plaintiff's house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house. Their position is, that this alone exonerates the company, without any reference whatever to the question whether the second house was so near the first that in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected. This question they have not discussed.

On the legal question upon which appellee's counsel thus rest the case, we can not adopt their views.

On the demurrer to the evidence, we must hold it tended to prove that the fire escaped through the carelessness of the defendant, and that the destruction of the plaintiffs' house was its natural consequence, which any reasonable person could

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have foreseen. The demurrer should, therefore, have been overruled.

The judgment is reversed, and the case remanded for trial.

*Judgment reversed.*

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|------|------|
| 59   | 364  |
| 31a  | 542  |
| 59   | 364  |
| 82a  | 580  |
| 59   | 364  |
| 91a  | 1128 |
| 59   | 364  |
| 197  | 1583 |
| 197  | 1584 |
| 59   | 364  |
| 103a | 34   |

FREDERICK BARTLETT *et al.*

v.

## THE BOARD OF EDUCATION OF FREEPORT SCHOOL DISTRICT.

1. SCHOOL TREASURER—*bond—approval*. Where the board of education of a school district elected a treasurer, required him to give bond, which he did, with security, and it was received by the board and acted upon by the parties: *Held*, to be a sufficient approval, without any such indorsement on the bond, or any entry thereof on their records. Such acts imply an approval. The provision of the statute requiring an approval, is merely directory. It was so held in *Green v. Wardell*, 17 Ill. 278.

2. In such a case, it is not material that the board of education did not fix the penalty of the bond. If executed in a particular sum and not objected to, but received and acted upon, that is sufficient, and it is not error to sustain a demurrer to a plea which sets that up as a defense.

3. TREASURER OF SCHOOL DISTRICT—*successor—demand of money by*. Under the statute creating a school district, it authorized the treasurer to receive all moneys of the district, and when the successor to a treasurer was appointed, giving bond to the satisfaction of the board, he may make a demand of his predecessor for all moneys in his hands belonging to the district, and such a demand, under the conditions of his bond, fixes the liability of his predecessor and his sureties.

4. BOND—*approval—parol evidence*. Parol evidence is admissible to prove that a board of education had, in fact, approved the bond of their treasurer, although it was not entered on the minutes of the proceedings of the board.

5. EVIDENCE—*account book*. In a suit on the bond of a treasurer of a school board, against him and his sureties, for money received and not accounted for by him, it is not error to admit his account book, as treasurer, to show the amount of money received by him, and this, too, although the

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entries were made by his clerk, and especially so when the treasurer swore that there was in his hands a sum equal to that shown by his books.

6. **BOND**—*non est factum*, *filling blanks*. The treasurer's bond, in this case, was written by him, and he left a blank for the names of his sureties and the amount of the penalty. The sureties filed a plea of *non est factum*, and it appeared on the trial that the sureties signed the bond, and the blank for the amount of the penalty was subsequently filled up by the treasurer and delivered to the board, who had no notice that the blank had been filled after the bond was signed. The sureties never gave notice to the board that the bond had been altered, and the treasurer received large sums of money by virtue of having given the bond, and afterwards became a defaulter: *Held*, that if not a fraud perpetrated by the sureties, it is unfair and unjustifiable in morals, and would, if allowed, be an ungracious defense, and that the bond did not become void.

7. **AUTHORITY**—*to fill blanks—when presumed*. When commercial paper and unsealed agreements are signed with blanks, and thus delivered, and the blanks are subsequently filled, the law presumes that authority to fill them was given at the time of their delivery.

8. **BOND**—*ratification*. Where sureties know that there is such a blank, and they sign the instrument and fail to notify the obligees that they regard the bond as void, and they know that, by filing the bond, the treasurer would obtain money, it will be inferred that they ratified the act, rather than that they were intending to aid the treasurer to perpetrate a fraud on the obligees.

9. In such a case, where the sureties, after finding that their principals had appropriated the fund, took mortgages and other securities, it is evidence from which a jury may infer that authority had been given, or that a ratification had been made.

10. Where an obligor intends to, and does acts, which fully recognize the validity of a bond, it need not be present and formally delivered to constitute a valid ratification.

11. **INSTRUCTION**. An instruction which informs the jury that if they find certain facts, which, if true, constitute a defense, to be true, then they should find the issue in a particular manner, does not find the facts, and is unobjectionable.

12. Where an instruction asserts a correct legal proposition, applicable to the facts of the case, it is proper for the court to give it; and if the other party desires to have its operation limited to a particular point in the case, he should ask an instruction for the purpose.

**APPEAL** from the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. F. C. INGALLS and J. A. CRAIN, for the appellants.

Messrs. BAILEY & NEFF, and Messrs. BLANCHARD, BARTON & BARNUM, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of debt, brought by appellees in the Stephenson circuit court, against appellants, with Esrom Mayer, on his official bond as treasurer of the Freeport school district. At the December term, 1870, a trial was had by the court and a jury, resulting in a judgment in favor of appellees for \$7,351.36, from which this appeal is prosecuted.

It appears that Mayer, on the 11th day of June, 1869, was elected treasurer of the district by the board of education for the ensuing year, and was required to give bond with surety, as such treasurer, in the sum of \$20,000 ; that, before entering upon the duties of the office, he filed the bond on which suit was brought, signed by him as principal, and Bartlett, Clayton, Little and McCall, as sureties ; that he thereupon entered into the office and upon the discharge of its duties, and received, at divers times, moneys to a large amount. At the expiration of his term, he failed to pay over to his successor the funds in his hands as such treasurer, belonging to the board of education, which the jury found to be the amount of their verdict, and for which this judgment was rendered.

It is first urged, that the court below erred in sustaining a demurrer to appellants' second and third pleas. The second avers that the bond, upon which the suit was instituted, was never approved by the board of education. The first count of the declaration avers, that the bond was received by the board, and if so, the bond required no further approval. If received and acted upon by the parties, that was sufficient, without a formal approval entered upon the bond itself, or the record of their proceedings. The statute creating the district requires the bond to be in such sum as the board shall determine, but as nearly double the sum that may be in his hands at one time

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as could be ascertained, to be approved by the board. The purpose of the provision requiring an approval was, that the board should have the power to reject any bond offered by the treasurer, unless the security should be sufficient ; to give them the power to reject a bond, unless sufficient to secure the district from loss ; to prevent the treasurer from obtaining the money on a defective bond or insufficient security.

Numerous decisions of other courts hold that, in such cases, the provision of the statute is merely directory. But the question is settled in this State, by the case of *Green v. Wardell*, 17 Ill. 278. In that case it was held that, when the bond was executed by the parties and delivered to the clerk for his approval, it became obligatory upon them, unless it was disapproved by him ; that his mere non-action did not deprive the officer of the power to act as such. It was also held that, if the clerk was not satisfied with the sureties, he should have disapproved the bond so that the officer might find other sureties ; that, if this was not done, upon principle, the bond became obligatory to secure the rights of the public, and the bond was held to be binding on the parties from the moment it was delivered to the clerk. No one would suppose, had the board of education sued the treasurer to recover the money he retained for his fees, upon the ground that he was not properly in office because his bond was not formally approved, that he would not have been protected, or that they could have recovered. Being filed, not rejected, and treated by all parties as approved, the effect is the same as though an approval had been indorsed. The want of such action has not, in the slightest degree, increased the liabilities of the obligors, or in the remotest degree occasioned them injury.

The third plea denies that the board required the treasurer to give bond in the penal sum of \$20,000. We fail to perceive that the averment in the declaration was material, and if not, its being traversed by the plea would have presented an immaterial issue. The law only declares that the treasurer shall execute to the board an official bond, with good and sufficient

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securities, to be approved by them, in such sum as they might determine. When the bond was presented in the penalty of \$20,000, with the sureties, and received by them, the law was complied with as to the amount. As was said in *Green v. Wardell, supra*, if the bond was not satisfactory, it was the duty of the officer to reject it, and so it was the duty of the board, that the treasurer might obviate the objection. It did not matter whether the board had, by resolution or otherwise, fixed the penalty of the bond before it was presented, as by receiving it, and the parties treating it as a valid instrument, the requirements of the law were substantially performed, and all parties as fully bound by it as though the penalty had been previously and formally fixed by the board.

It is next urged, that the court below erred in admitting improper evidence of a demand on the treasurer to pay over the money in his hands, belonging to the board, to his successor in office. Under the statute, the treasurer is entitled to receive and hold all moneys belonging to the board, and Mayer's successor, when he was elected and had given bond to the satisfaction of the board, became the treasurer, and Mayer ceased to be any longer treasurer, and he then was bound, under the condition of his bond, to pay whatever sum was in his hands, to his successor. And on a demand by the latter, who was legally entitled to receive it, that was all that was required to fix his liability. Had he paid to his successor, he would have been protected by the law and the condition of his bond, without any notice from the board, or order from them to pay to his successor. If anything was done by way of giving notice beyond the demand from his successor, it was immaterial, and proof thereof was unnecessary, and could not have prejudiced the rights of appellants.

As to the parol evidence that the bond was approved in fact, but no record made of such approval, we fail to perceive that it was erroneous. Corporations may, and usually do, keep a record of their proceedings, but it is not always necessary to their validity that they should be recorded. Had this been an

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agreement to deliver to the board a quantity of fuel, or to perform labor on their school edifice, or its grounds, and appellants had sued for a breach of contract, they nor any one else would suppose that they could not recover because the agreement had not been reduced to writing, or spread upon their journals. Parol proof would be, in such a case, fully competent to establish the liability of the parties by showing what was said and done. In *Ryan v. Dunlap*, 17 Ill. 40, it was held, that parol evidence was admissible to prove a vote of the directors of a bank to accept one security in the place of another, where no record had been made of the vote. If that could be so proven, we are at a loss to understand why the same may not be done by parol, to show the approval of an official bond to a board of education. The rights of the people, and their money raised for the purposes of education, can not be lost by the carelessness or incompetency of officers in omitting to make such entries.

Nor do we perceive any objection to introducing the account books of the treasurer, by which to ascertain the amount of funds which came to his hands. Had Mayer made admissions of the receipt of school funds, we presume no one would doubt such admissions would be legitimate evidence both against him and his sureties, and the entries made by him, or under his directions, would be equally binding, as they are undeniably as deliberately made as had they been oral; and having constant access to his account book, we must presume he was familiar with all of the entries it contained, and must have been aware of the entries made by his clerk; and if so, the book was evidence. But this all became immaterial, inasmuch as Mayer, himself, on the stand, swore there still remained in his hands the precise sum found by the jury, and he had previously admitted the same sum to his successor. It is thus rendered clear, that any evidence of what his book contained could not, and did not, in the slightest degree, prejudice the rights of appellants.

Having disposed of these preliminary questions, we now come to the important questions of the case. They arise under the plea of *non est factum*, sworn to by appellants. The facts are, that the bond is, all but the signatures, in the handwriting of Mayer; that the board had fixed the penalty at \$20,000, and informed him of the fact; that he drew the bond blank as to the names of the sureties and the amount of the penalty; it was signed with the blank as to the amount unfilled; that the amount was subsequently inserted, but before it was delivered; that he did not inform any member of the board of that fact, nor does the evidence show that the board, or any member of the same, had the slightest reason to suspect that the bond was not written in full before it was signed by each surety. The bond was received, filed, and Mayer entered upon the duties of the office, received large sums of money on the faith that the bond was good, without either of appellants ever intimating to the board that they regarded the bond nugatory; and now, when Mayer appropriates the money to his own use and proves a defaulter, all by means of their signatures to the bond, they come forward and claim that it is, and always had been, void. If this is not a fraud, it is certainly unfair and unjustifiable in morals, on the part of appellants. If it is a defense at law, it is an ungracious one to say the least.

It has been generally held, that where a party signs a bond in blank, and the obligee fills it, or knows that it had been filled without the assent of the obligor, the instrument is void and can not be enforced, and such is the doctrine of this court. But the decisions of other courts are by no means uniform. Anciently the doctrine was more rigid than is now held by the courts. The general rule is, that when a person executes a note or bill of exchange in blank, either as to the name of the payee or the sum to be paid, and delivers it, there is an implied authority to fill the blanks when it is negotiated. *Ward v. Young*, 21 Ill. 223. And in that case it was held, that when a surety signed a note and placed it in the hands of the



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principal, with the agreement that other persons should sign it as sureties, and the note would not be delivered until thus signed, but the other signatures were not obtained, and the note was delivered to the payee without notice of the agreement, the surety could not set up the fraud practiced upon him by his principal against the innocent payee. Some decisions hold, that single bonds for the payment of money, as also penal bonds, when signed in blank, may, in like manner, be filled and become binding, on the presumption that it was authorized by the obligor. *Wiley v. Moore*, 17 Serg. and Rawle, 438; *Knapp v. Matthy*, 13 Wend. 587; *Boardman v. Grove*, 1 Stewart, (Ala.) 517; *State v. Dean*, 40 Mo. 464; *Com. Bank of Buffalo v. Kartright*, 22 Wend. 348; *Sthal v. Berger*, 10 Serg. and Rawle, 170; *Sigfield v. Sevan*, 6 ib. 308; *Bank v. Curry*, 2 Dana, 142; *Tixira v. Evans*, 1 Anstruther, 229. Numerous other decisions might be quoted to the same effect, if necessary, to show that the ancient common law rule has been greatly modified.

We feel fully justified in holding, that where a bond, executed as this was, and delivered to the obligee and accepted by him, without notice of any change by filling the blanks, it may be inferred that the sureties authorized the change, and the instrument will be binding. This is the rule announced in *Smith v. The Board of Supervisors*, *post*, p. 412.

But, independent of the question of authority to fill the blanks before the bond was delivered, the question arises, whether the sureties did not ratify its execution. Two of them swear they knew of the blanks when they signed it, and it may be safely inferred that the others were cognizant of the fact, as men usually inform themselves of the contents of such instruments before executing them. They knew it was intended to be used as an effective obligation, and to indemnify the district from loss in case Mayer should become a defaulter; that the design was to enable him to get the custody of this fund. We will not presume these sureties intended to aid Mayer to perpetrate a fraud upon the board, by palming upon them

an invalid instrument, when there was nothing to arouse their suspicions that the bond was worthless. The sureties did not communicate to the board the fact that they executed the obligation in blank, until Mayer became a defaulter, and the question as to their liability had arisen. We will not indulge the presumption that appellants intended, deliberately, to perpetrate so gross a breach of good faith and fair dealing.

In such a case, it is more reasonable to believe that appellants authorized Mayer to fill the blank, or, knowing all the circumstances, and feeling that honor and good faith required it, they ratified the act. Under these circumstances, it would not require the same amount of evidence to satisfy the minds of fair and intelligent persons that such was the fact, as would be required to prove them guilty of so gross a fraud, or that Mayer was guilty of forgery in filling up a blank bond without authority, which, it is contended, was as inoperative as though the paper was blank upon which it was written, so as to give it the semblance of a valid and operative instrument. In fact, before the jury would suppose that Mayer had committed such a crime, and that appellants knowingly placed it in his power to do so, for that purpose, they would not require plenary proof that the necessary authority was given, or that the act was subsequently ratified; but slighter evidence would be convincing.

So far as we can see, from the record, there is no positive or direct proof that authority was given to fill the blank, and no other circumstantial evidence than arises from the facts which attended its execution and delivery. What that amounted to, was a question for the consideration of the jury, and, in connection with the standing of the parties in the community, may have been entitled to considerable weight.

But, it appears that appellants did not remain passive, but as soon as they found that Mayer had dishonestly appropriated the money, they proceeded to obtain mortgages to indemnify them against loss. This, with business men, is not intended, nor is it regarded, as an idle ceremony. It is significant, and

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usually implies a belief of liability, either already or intended to be incurred. If they knew that the bond was signed in blank, as we presume they did, and they had not given authority to fill it, they must have known that it was worthless, and why did they begin to make efforts to secure themselves? We must conclude that it was because they had authorized Mayer to fill the blank, or intended to perform the obligation of the bond, as, some of the witnesses say, a part of them said they did, when negotiating for a settlement of the matter. This, whilst it is not clear and positive proof, is, we think, a strong circumstance tending to prove a ratification, or authority when the signatures were attached. And this question was fairly submitted to the jury by the instructions, which indicate that the ground mainly relied on in the court below, for a recovery, was a ratification. And there can be no pretense, that appellants were not apprised of the facts when the security and indemnity were taken. They knew how they had executed the bond; that it had been filed; that Mayer had become the treasurer and received the money by using the bond; that he had used the money, and they must have supposed that they then were, or they intended to become, liable. We think, under all of the circumstances, this evidence was sufficient to warrant the finding on this branch of the case.

The objection to appellees' first instruction is not well taken. It commences by telling the jury, that if they find certain facts from the evidence, and the second clause directs them, if they further find other facts, then they should find for the plaintiffs. This, to men of only ordinary capacity, points them to the evidence as the basis of their action. Nor do we see that it assumes any fact that was being controverted. Mayer had testified that he was indebted, and the indebtedness in some amount was not controverted.

It is contended, that the second instruction is erroneous, in telling the jury that if appellants took from Mayer security to indemnify them from loss, as his sureties, and they, at the time, knew that the word "twenty" had been written in the

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Opinion of the Court.

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bond after it was signed, this was evidence tending to prove a ratification. In this, we can see no objection. The evidence manifestly tended to prove that fact, and had the court refused to admit it to prove the fact, it would have been error, for which the judgment, had it been adverse to appellees, might no doubt have been reversed. No objection is seen to the third of appellees' instructions. It announces a correct principle of law, and had appellants desired that it should be limited to particular facts, they should have asked an instruction for that purpose.

The fourth of appellees' instructions was based on the evidence, and no objection is perceived to the legal proposition it announces. What we have already said in reference to Mayer's liability to pay the money to his successor, disposes of the objection to the fifth instruction.

It is objected, that the court erred in refusing to give two instructions asked by appellants. We do not understand that, to ratify a bond which is invalid when delivered, it is necessary that the bond should be present, and a formal delivery made. But the first of these instructions asserts that such a delivery is necessary to a valid ratification. We have already seen that it was fairly a question for the jury to say, whether the taking of the mortgages as an indemnity amounted to a ratification. And this instruction asserts that it was not, and hence it was properly refused. A careful examination of the entire case fails to disclose any error for which the judgment of the court should be reversed, and it is affirmed.

*Judgment affirmed.*

MARCOUS WALKER

v.

ORAMEL S. HOUGH.

|     |     |
|-----|-----|
| 59  | 375 |
| 23a | 378 |
| 25a | 164 |
| 59  | 375 |
| 56a | 549 |
| 59  | 375 |
| 78a | 170 |

1. **FRAUD**—*what amounts to.* Fraud vitiates every contract, but every false affirmation does not amount to a fraud—a knowledge of the falsity of the representation must rest with the party making it, and he must use some means to deceive or circumvent.

2. **SAME**—*of the proof required.* To justify a court in rescinding a contract, executed by both parties, on the ground that one of the parties was induced to enter into it through fraud practiced by the other, the testimony must be of the strongest and most cogent character, and the case a clear one.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. HENRY S. MONROE and Messrs. HOWE & RUSSELL, for the plaintiff in error.

Messrs. DENT & BLACK, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was a bill in chancery, praying that a sale of certain lots in Chicago, by Hough to Walker, for stock in the Chicago Patent Wood Hangings Company, be cancelled, and the lots reconveyed to complainant on the return of the certificates of the stock, on the allegation of false and fraudulent representations, on which complainant relied, of the value of the stock.

Much testimony was heard, and the court found that Walker had made and caused to be made to complainant material and fraudulent representations, whereby he was induced to, and did convey to Walker, the lots described in the bill of complaint; and on complainant depositing with the court, to be surrendered to Walker, the certificates of stock

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Opinion of the Court.

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issued by him to complainant, a reconveyance of the lots was decreed, and that he be reinvested with the title to the lands.

To reverse this decree, Walker brings the record here, by writ of error, assigning, as the only error, that it is contrary to the evidence.

The substance of the charges in the bill is, that Walker, through his agent, represented to complainant that all the stock of the company had been taken but five hundred shares; that the company was in a flourishing condition, and was making large sums of money, over and above all costs and expenses, to the extent of \$5000 per month; and with the intent to cheat, wrong and defraud complainant, and to induce him to sell and convey the lots, Walker presented to him what purported to be a true and exact statement of the assets and liabilities of the company; and with the further intent to defraud the complainant, Walker stated to him that Allen & Mackey, leading dealers in decorative paper, in Chicago, had purchased of him the right to use the patent in the city of Chicago for one year, paying him therefor \$2500; that this firm had examined the patent, and, from the results of their investigation, they had pronounced it to be a great success, and that it would come into general and constant use, and by the interest that firm took in the patent, it would be brought favorably before the public; that at the end of a year they would be desirous of purchasing other and valuable rights to use the patent and be willing to pay the company liberally therefor, and would induce others to buy; all which would greatly enhance the value of the stock—complainant's among the rest. And with the further intention to defraud complainant, Walker further stated to him that he, as the owner of the patent, had organized the Chicago company, which, having been in operation but two months, had actually made, over and above all expenses, \$10,000, thereby causing complainant to believe it would be safe and profitable to become a stockholder.

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Opinion of the Court.

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It is then alleged that, relying on these representations, complainant conveyed the lots to Walker for two hundred and fifty shares of stock, valued at \$40 a share, and charges that all the representations were false and fraudulent, and that the stock was worthless.

The answer of Walker denies all the charges of false representation, and alleges that complainant investigated and thoroughly examined the patent, the working thereof, and the business and affairs of the company, and satisfied himself, from such personal examination and investigation, that the patent was a valuable improvement. He denies representing to complainant the arrangement with Allen & Mackey, as charged, but says he negotiated with them a license to use the patent in Chicago for one year, and if the arrangement had been carried into effect, he expected great gain to result therefrom; and denies that complainant was in any manner induced to purchase the stock and execute the deed by reason of any representations made to him concerning the firm of Allen & Mackey. He also denies that he represented to complainant that the company had made \$10,000 in two months, as alleged, and alleges that the trade was made after complainant had examined, personally, into the business and affairs of the company. He denies that the invention is worthless, or that the stock is of no value; and he alleges that immediately prior to filing the bill of complaint, complainant, from the personal investigation he had made, expressed himself perfectly satisfied with the trade, and that the trade was made by defendant in good faith, and complainant believed the stock was a fair consideration for the lots of land. He then alleges that, since making the trade, a bill passed the general assembly, locating a public park near these lots, whereby it was supposed their value would be greatly enhanced, and charges that as the moving cause to filing the bill.

Are the allegations of complainant sustained by the proofs in the cause? Do they so greatly preponderate in his favor as to justify allowing the prayer of his bill?

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Opinion of the Court.

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The parties were sworn, and many witnesses, in regard to the utility of the invention, a large majority of whom testify in its favor, and say that in the hands of skillful persons it is a success, and is in great favor in the cities of New York and Boston. In some instances, when applied to plastered walls in Chicago, and by unskillful persons, by those not instructed in its preparation and application, it proved a failure, while in one case, when the work was conducted by a person skilled in the business, it was a perfect success.

The parties are at issue upon the prominent allegations of the bill; if they are sustained by the proof, the decree must be affirmed.

All will concede that fraud vitiates every contract, and the concession will be equally universal, that every false affirmation does not amount to a fraud. A knowledge of the falsity of the representation must rest with the party making it, and he must use some means to deceive or circumvent. *Sims v. Klein*, Breese, 302.

There is no proof that Walker made the representations charged, except that by complainant himself, and he is contradicted by Walker. Complainant, holding the affirmative of this issue, is bound to prove it by a preponderance of testimony; this he has not done. Defendant's denial under oath, is as potential as complainant's assertion under the same sanction, and being oath against oath, the fact is not proved. It is said, by complainant, his testimony is corroborated by Strong. We do not find that Strong testified to this point, or was interrogated in relation to it. Complainant claims, too, that Strong was Walker's agent, and that he made this representation. If he did, about which we have no other proof than complainant's testimony, there is no proof that Walker authorized the statement, or that Strong knew it to be false. Strong states that the weight of the representations he made, he received from Morey, the treasurer of the company, and from the bookkeeper and secretary, and that, at his own instance, complainant went to the office of the company, investigated the



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Opinion of the Court.

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matter thoroughly, and talked with all the parties, Walker being present. The books, containing the transaction with Allen & Mackey, were open before him, and he saw there its whole length and breadth, and that was the payment by Allen & Mackey to the company of \$1000, the purpose of which is fully explained by the testimony of Walker. The books, to this extent, corroborate Walker. It was a matter of no importance to complainant whether the sum paid to the company was \$1000 or \$2500; it was sufficient for him to be satisfied that the company had the favor of a firm so well known in the city as Allen & Mackey. The precise terms of the contract with them complainant did not see the necessity of inquiring into, as they were of no particular importance. Had complainant considered it a matter of any importance, it was very easy for him to interrogate that firm about the terms, as it was located in the near neighborhood of the company's office. The representation of Strong, if made, could not have deceived or misled complainant, as it was set right by the books, which were open to him. It is quite evident complainant did not rely on these representations; if he had intended to rely upon them, why consult the books of the company? When they were consulted, no such arrangement was found there, and yet complainant consummated the trade and executed a warranty deed, and received the stock. It can not be that complainant was induced to make the contract by what Strong said, when the books told a different story. But the proof tends strongly to show that, in this particular transaction, Strong was the agent of complainant to trade these lots for this stock. Walker so testifies and so does Strong. Strong subscribed for the stock, as agent of complainant, and was to have a commission in the shape of a certain number of the shares, and, stimulated by this expectation, it was to his interest to make such representations as would induce the trade, in no way, however, authorized by Walker to make them.

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Opinion of the Court.

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There is not a word of proof that the account, stated in exhibit "A," was known by Walker to be untrue; nor is it proved that it was not substantially correct. There is not the least ground for supposing that the account was concerted for a purpose, or to create false appearances—one of the orders mentioned in it being afterwards withdrawn, the sender claiming it was optional with him so to do. Walker, himself, may have been deceived as to the amount. The business of keeping and stating the accounts of an incorporated company is usually entrusted to the under officers of the company, and of the accuracy and truth of which, the president of the company may have no knowledge. It does not appear that Walker had any knowledge that the statements in it were not perfectly correct. And it is in proof, by one of complainant's witnesses, that he examined the books of the company and found them substantially correct.

We are not prepared, on this state of proof, to rescind a contract executed by both parties. To justify a court in doing so, the testimony must be of the strongest and most cogent character, and the case a clear one.

It is evident, from a view of all the testimony in the record, that complainant imagined he had made a great speculation by selling lots for which he never demanded more than \$5000, and getting stock in a company, valued to him at \$10,000, and was willing, with such a bright prospect before him, to take some risk.

It appears, when the stock of the company was all taken, and much of it by some of the best business men of the city, Walker retired, and it was reorganized, with complainant as one of the directors. What, with the want of instruction of the workmen called to apply these hangings, and want of knowledge and energy and care of the board of directors, who had their own more important matters to attend to, the invention failed to receive popular approbation, the company ceased to do business, and its stock became worthless. Complainant is a loser by engaging in it; but he did so, uninfluenced, we

## Syllabus.

believe, by any misrepresentations of Walker. It is not for every losing bargain a court of equity will interpose to relieve.

The decree of the court below is reversed and the cause remanded.

*Decree reversed.*

CHARLES M. SMITH

v.

JOHN J. GEAR.

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|------|------|
| 59   | 381  |
| 194  | 4277 |
| 59   | 381  |
| 104a | 237  |

1. **JOINT PURCHASE OF LAND—*for sale—profits.*** Where two persons purchase land, as tenants in common, to be sold and the profits divided, and no time is agreed upon in which the sale is to be made, the law will require a sale in a reasonable time.

2. Where parties were purchasing stock, and one furnished money therefor, and the other to have half of the net profits when sold, and the parties purchased notes, secured by mortgage on lands, and it was agreed that the notes and mortgage were to be held by them in the same manner that they held the stock, and the mortgage was foreclosed, and the land purchased by the party who furnished the money to buy the stock, in his name, it would be error to decree one-half of the land to the person who was to have but one-half of the net profits.

3. **DECREE—*sale—profits.*** In such a case, it is not necessary to prove that there would be profits on a sale of the lands before the court would render a decree of sale, as it was the agreement of the parties that there should be a sale. But the chancellor might provide that the land be offered for sale, and if a sum, sufficient to yield a profit, should not be bid, decree that the party claiming the right to participate in the profits should be barred of all interest and equities in the premises.

4. In such an event, if any thing should be found due to the other party, who was to receive net profits, he would have a lien on the land for the same, and if not paid, the land should be sold to pay the same.

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Syllabus. Opinion of the Court.

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5. *SAME—equities of the parties.* In such a case it is error to order the property to be sold, and to reserve the question as to the equities of the parties until the coming in of the master's report.

6. *LIEN—outstanding title.* In such a case the party only entitled to share in net profits, did not acquire a lien against the land, by purchasing in an outstanding tax title and the equity of redemption, without the consent of the other party. In such a case as this, he had the right to make the purchase if he believed their rights were jeopardized; but so long as he claimed an interest in the contract, he could not purchase and set up an outstanding title. He could tender the title to the other party, and if he refused to assent to the purchase in aid of his title, for their mutual benefit, and allow what they cost or their reasonable value, the former could abandon his claim under the contract, and could use such a title adversely to the other party.

7. *SALE OF THE PROPERTY—when to be made.* In a case like this, after a reasonable time had elapsed, by use of ordinary diligence, for making a sale of the property, and it had not been sold, it was competent for the party not holding the title to file a bill to compel the property to be offered for sale, and if a sale could not be so made, and the party only having an interest in the profits failing to release his interest in the property on having any sum due him refunded, it would be competent for the other party to file a bill to have the claim of the party having an interest in the profits, extinguished, and neither party would be bound to wait an unreasonable time.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. EGBERT PHELPS and Mr. NORMAN C. PERKINS, for the appellant.

Messrs. GOODSPEED, SNAPP & KNOX, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The appellee exhibited his bill in the circuit court of Will county, in which it is alleged that, on the 30th day of March, 1865, he purchased of one Tobias, who was acting as the agent of the maker and the payee, certain promissory notes, secured by mortgage on the land in controversy, for the sum of \$1650; that at the date of the transaction he was in the employment of the appellant as manager of his farm, at a fixed salary, and in addition to which appellant was to furnish

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Opinion of the Court.

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appellee funds with which to buy stock on speculation, appellee to have one-half of the net profits as compensation for his services, and the appellant the other half; that while he was so engaged in the service of the appellant, he purchased the notes and mortgage, and after some negotiations between the parties, it was finally agreed that the appellant should have a like interest in the notes and mortgage, and on the same terms as in their cattle operations; and that the appellant then gave his draft for \$1650, which appellee used in making the purchase.

Such proceedings were subsequently had, that the mortgage was foreclosed in the name of the appellee, and at the master's sale the property was struck off to the appellant as upon his bid.

The prayer of the bill is, that the appellee may have the benefit of the foreclosure suit, and the sale thereunder, the same as if the premises had been struck off to him; that an account be decreed of all matters relating to the mortgage and lands; that the title to one-half of the lands be perfected in appellee, on his refunding what shall be found to be justly due to appellant, and the title to the other half be perfected to appellant, or, if more consonant with the terms of the original agreement, a sale of the property be ordered, and that out of the funds arising therefrom, appellee and appellant may be refunded the respective amounts expended by each of them in the enterprise, over the receipts, and that the balance may be equally divided.

The answer admits the buying of the notes and mortgage from Tobias, as alleged, but insists that the appellee, in making the purchase, acted as the agent of the appellant; that the funds used for that purpose belonged to him; that in November, 1865, the appellee signed a communication to his solicitors in the foreclosure suit, stating that the lien on the land, to recover which suit was brought in the name of appellee, belonged to appellant; that they would bid off the property in his name and take title accordingly, and delivered the same to appellant, to

be transmitted to the solicitors, which he did; that the communication was an acknowledgment, by the appellee, that all legal and equitable obligations theretofore existing, if any, had been fully paid and discharged, and that by reason of the premises, the appellant is, and has been since the expiration of the fifteen months from the master's sale, entitled to a deed for the land in controversy, discharged from any claim of the appellee.

The answer, as originally filed, contains the following words: "And that all the interest complainant had in the transaction, was a certain share, to be given him, in the net profits, after the sale of the land," which words, the appellant, by leave of the court, struck out before the cause was brought on for final hearing.

In the view that we have taken of the case, we do not deem it necessary to comment on the allegations in the bill and answer, and the evidence relating thereto, in regard to the state of the accounts between the parties, at the date of the purchase of the notes and mortgage, for the reason that it seems to us that it is very clearly established, by the evidence given by both parties, that the funds with which the notes and mortgage were purchased belonged to the appellant. Of this there can be no dispute. The contract, as stated by the appellee himself, is inconsistent with any other theory.

It was understood, when the notes and mortgage were bought, that Johnson, the maker, would not redeem the land, and that the title would mature in the holder. We have no doubt that the original agreement between the parties was, that the notes and mortgage, or land, should be purchased on the same terms as stock had been bought and sold, on speculation, viz: that the appellant should furnish the funds, and that the appellee would be entitled to one-half of the net profits when the land should thereafter be sold. Both parties substantially testify to this agreement, and the words struck out of the answer, by the appellant, after he had sworn to it, strengthen this view of the case.

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Opinion of the Court.

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It is not pretended that, by the terms of the original contract, there was any definite time fixed in which a sale of the property should be made that would determine the profits of the transaction. All that was said on that subject was, that there should be a quick turn made of the money invested.

It is insisted, however, by the appellant, that an arrangement was afterwards made that the sale should be made during the year 1866, and unless such sale was made during that period, that the interest of the appellee in the transaction should cease. The answer contains no such averment, but if it did, it is an affirmative allegation, and the burden of proof to maintain it rested on the appellant. The evidence, on this point, is not sufficient to overcome the express denial of the appellee. We find nothing in the record that would change the original contract, and fix a definite period in which the property should be sold and the profits declared. In the absence of any special contract, the law would imply that the property should be sold within a reasonable time.

The rights of the parties must, therefore, depend on the construction that shall be given to the contract as originally made. It seems to us to be clear that, under the agreement, the land itself would belong to the appellant, and the interest of the appellee would only attach to the net profits arising upon a sale of the property. He could take no interest in the estate itself. The true construction of the agreement under which the parties were operating in stock, is, that the stock belonged to the appellant, and the only interest of the appellee was his just share of the net profits. It was purchased for him with his funds, and the appellee had no interest, unless a profit was realized upon a sale. The land was bought under a like agreement, and was held upon the same terms. The prayer of the bill, that the title to one-half of the land should be perfected to the appellee, upon the payment of the just amount that should be found due to the appellant for the purchase money and expenses advanced, was properly denied by the circuit court. It would have been

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Opinion of the Court.

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competent for the parties themselves to have declared the profits in lands, but this they did not do, and it is not in the power of the court to make any division of the estate, and decree that any portion of it is profits. It would, in effect, be to make a new contract between the parties. *Porter v. Ewing*, 24 Ill. 619.

The principal question that arises on the record, to be considered, is, whether the appellee, under the bill filed, and on the evidence taken on the hearing, was entitled to have the land sold and a division of the profits, if any, declared.

It is insisted that it is necessary for the appellee to show, by the evidence, that a profit would result from a sale, in order to give the court a basis on which to rest its decree.

It is a sufficient answer to this objection, that it was the agreement of the parties that the land should be sold. Such was the contract in regard to the stock, and the land was purchased on the same terms. Lands do not have a standard value, like some articles of personal property, that can be accurately ascertained by testimony. Witnesses, of equal candor and good judgment, differ so widely in their estimates of values, that it is often very difficult to form any just conclusion as to what land would bring, if offered for sale. The surest test, as to whether the land would, in this instance, bring more than the amount due the parties in interest, would be to offer it at public sale.

The court, by its decree, may so provide that no injustice will be done to either party. It would be competent for the court to decree that the property should not be sold, unless, when offered, it would bring more than the amounts which shall be found to be due to the respective parties. Upon the master reporting that fact to the court, a supplemental decree should be entered, forever barring all the interest and equities of complainant in the premises. In case, however, anything should be found to be due to the complainant for money expended for the common benefit, the court should require the



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Opinion of the Court.

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defendant to pay such amount. On his failure so to do, it would be equitable to decree that the complainant should have a lien on the premises, and have the same sold in satisfaction of his claim. In such cases, the costs are in the discretion of the court, and it can make such order as will do justice.

The circuit court, in its decree, ordered a sale of the property, without first adjusting the equities between the parties as to the amounts respectively due to each of them for money advanced in regard to the purchase and other expenses for the benefit of the enterprise, but reserved that question until the master should produce, in court, the proceeds of the sale. This, we think, was error. It is indispensable that the court should first adjust the amounts, respectively, due, in order to obtain a basis upon which to found an equitable decree for the sale of the estate.

It appears that the appellee has since bought a tax title on the premises, and also the equity of redemption of Johnson, the mortgagor, and now asks to have the amounts paid for the same taken into the account in adjusting the equities between himself and the appellant.

These purchases were made without the knowledge or consent of the appellant, and the appellee can not compel him to consent to the purchase in aid of his title, unless he chooses so to do. The appellee had no right to buy up an outstanding title, whether it is good or bad, and tack it to the original transaction, without the consent of the appellant. If such was the rule of law, he might buy a worthless title, at an unreasonable price, under a collusive bargain with the holder, for the purpose of reducing the share of the profits that would enure to the appellant in the undertaking.

In case he believed that their interests would be jeopardized by an outstanding adverse title, he would have the indisputable right to buy it in for their protection. But so long, however, as the appellee claimed an interest in the premises, under the contract, he could not assert the titles so purchased,

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Opinion of the Court.

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adversely to the interests of the appellant under that contract. It would be his duty to tender such titles to the appellant, and if he declined to assent to the purchase in aid of his title, for their common benefit, and allow what they cost, or, at least, their reasonable value, he could then, by abandoning his claim under the contract, use the titles so obtained, to his own use and benefit—even adversely to the title of the appellant.

In the view that we have taken, the decree of the circuit court is erroneous and must be reversed.

It will be the duty of the circuit court to refer the cause to the master, to ascertain and report the amount due to the appellant for the purchase money advanced and expenses incurred in perfecting the title, and also, for any permanent improvements made on the premises, and also, for taxes paid, less the net proceeds actually received in rents from the lands.

If the appellant shall elect to avail of the titles purchased by the appellee, the court will direct the master to find the amount due appellee therefor, and also the amount that the appellee may have expended in and about the purchase, for the common interest, and will deduct therefrom any amount he may have received in rents from the lands. The master will allow the respective parties interest, at the rate of ten per cent per annum, on the amounts by them advanced in the transaction.

Upon ascertaining the amounts due to the parties on the basis suggested, the court will decree a sale of the lands; and in case a sale can be effected that will produce a profit over and above the amount that shall be found due, out of the proceeds the court will order and direct: first, that the costs in the circuit court shall be paid; second, that the amounts that shall be found due to the parties, shall be fully paid; and third, the balance shall be divided equally as profits.

A reasonable time having elapsed, in which the appellant, by the exercise of ordinary diligence, could have made a sale

of the property, it was entirely competent for the appellee to file a bill to compel him to make such sale ; at least, to offer it at public sale, to the end that he might be permitted to enjoy his just share of the profits. On the other hand, if a sale could not be made, after the elapse of a reasonable time, so as to realize a profit, and the appellee would not release his interest on payment of whatever amount he may have actually advanced, it would be competent for the appellant to file a bill with proper averments, and, upon satisfactory evidence, to have a decree that would cut off and forever bar his interest in the premises. Neither party would be bound to wait an unreasonable time to see if a sale could be effected by which a profit would be realized.

It is to the interest of both parties to such a transaction, that the relation in some way should be terminated. In case the parties can not mutually agree, we are of opinion that either party, after the elapse of a reasonable time, may have the relations dissolved, and the equities between them adjusted, filing a proper bill for that purpose.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

*Decree reversed.*

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| 59  | 389 |
| 29a | 44  |
| 50  | 389 |
| 144 | 348 |

JOSEPH SHERLOCK *et al.*

v.

THE VILLAGE OF WINNETKA *et al.*

1. CORPORATION—*injunction*. A court of equity may grant relief against a municipal corporation as well as against a natural person, in most cases. But there are acts which a corporation may do within the limits of its charter, without being subject to the supervision of any court; such acts are those done under its legislative and discretionary powers.

## Syllabus.

2. A municipal corporation, in reference to its property, stands on the same footing as other corporations. Its corporate property is held in trust for the benefit of its constituents, and it is bound to administer such property faithfully, honestly and justly, and if guilty of a breach of trust by disposing of valuable property without any, or for a nominal, consideration, it will be regarded in the light of the representative of a private individual or private corporation. The fact that the forms of legislation are used in committing such a breach of trust, will not change the character of the act. Such is not the exercise of political power, delegated for public purposes, and exemption from judicial interference terminates where legislative action ends.

3. CORPORATION—ITS POWERS. The common council has no authority to purchase lands, erect buildings, and issue bonds pledging the corporate property and the faith of the corporation, for any but municipal purposes. Where the design in purchasing the land, erecting the buildings and issuing the bonds, is for private, to the exclusion of corporate purposes, and for private gain, it is a gross breach of trust, a fraud upon the law and the tax payers of the municipality, and a court of equity will take cognizance of such a case.

4. BONDS OF THE CORPORATION—*sale of—void*. The sale of its bonds by a municipal corporation to the members of its council, is void, irrespective of the principles of equity as applied to persons acting in a fiduciary capacity, and independent of the fact that it was a part of a scheme to pervert the property of the corporation from its legitimate municipal purposes to private ends. Such a sale is void, on the ground that no man can contract with himself. If a board of trustees were to convey the corporate property to themselves, the sale would be void, without reference to its fairness or its benefit to the corporation. So, if such a sale is made to one of their members, he being one of the parties contracting with himself.

5. Nor does it change the transaction, where a portion of the trustees were also trustees of an academy, and to-whom the sale was made, and where the sale was for the purpose of fraudulently perverting the corporate property of the municipality to the purposes of a mere private enterprise.

6. The bonds issued by the corporation to its own members, being void in their hands, they could not be enforced for either principal or interest, and nothing could be due thereon in their hands; and it follows that the levy of a tax for their payment would be illegal, unjust and oppressive to the tax payers.

7. JURISDICTION IN EQUITY—for all purposes in the suit. It is a rule of equity practice, that when the court acquires jurisdiction for one purpose, it will retain it for all purposes necessary to complete justice between all parties interested in the subject matter. Hence the rule that all persons in interest must be parties in equity.

## Syllabus. Statement of the case.

8. **MULTIFARIOUSNESS.** No rule or abstract proposition as to what constitutes multifariousness, can be stated. But, as a general rule, the joining in one bill distinct and independent matters, will constitute multifariousness.

9. It is not multifariousness to make the collector of taxes a party to have their collection enjoined, and to state in the same bill the grounds and circumstances upon which the relief is sought. Nor is it ground of demurrer to allege, in the same bill, that the common council had passed an ordinance to issue bonds of the municipality for \$8000, for the purpose of building a boarding house for the use of an academy, which would be a charge on the tax payers, to do which, would be in furtherance of a fraudulent scheme to pervert the corporate property to private uses, and is germane to the other facts stated in a bill to restrain the collection of taxes imposed by the common council.

10. **PURCHASE—rescission.** Where a municipal corporation has power to purchase land for corporate purposes, and a purchase is made, and in doing so the common council designed to pervert it to private purposes, that affords no ground for cancelling the deed, as the parties could not be placed *in statu quo*. The vendor could not be compelled to pay for the buildings and other improvements placed thereon, and it would be inequitable for him to get them without paying therefor.

**APPEAL** from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a bill in equity, filed in the Superior Court of Cook county, by Sherlock and twenty-five others, as property owners and tax payers, against the village of Winnetka, the Winnetka Academy, and others, members of the council of said village, and the collector thereof.

It appears, from the allegations of the bill, and the acts of the general assembly referred to therein, that the village of Winnetka was incorporated by a special act. Private Laws 1869, vol. 4, p. 221.

Section 1 of article 2 of the act provides, that the municipal government of said village shall be composed of a president and five trustees, who together shall constitute the council of said village.

These officers are made elective. The same section provides for the election of a marshal, who shall be *ex officio* collector, for an assessor, and other officers.

## Statement of the case.

Section 1 of article 4 provides, that the council shall have power to purchase land in said village, and erect thereon buildings, and make other improvements for an educational institution of a high grade; to borrow money for such purposes, and issue bonds of said village in such form and for such amount, and for such time—not less than five years, nor more than twenty years—bearing such rate of interest, not exceeding ten per cent per annum, as the council may by ordinance provide, thereby *pledging the corporate property and the faith and credit of said village* for the payment of principal and interest of said bonds, with power to issue other similar bonds in like manner to pay or replace said bonds when they shall become due. Provided, that bonds exceeding in total amount of principal the sum of \$20,000, shall not be issued in any one year; and, that the amount of principal of said bonds, outstanding and unpaid, shall not, at any one time, exceed the sum of \$50,000.

The 5th section of same article declares the said village to be a school district, and the council to be *ex officio* a board of education, and that in addition to the powers which school directors have by law, the council shall have power to establish grade schools, *and a high school*, to build school houses for the same, and levy taxes for the erection and support of the same.

Superadded to these special powers, is the provision of section 4 of article 3, that: "The council shall have control of *the finances and all the property, real, personal and mixed, within the corporate limits*; and shall have power within said limits, by ordinance," amongst other things, "to provide for, or erect, suitable buildings for the use of said village and its officers."

It appears, from the allegations of the bill, that the "educational institution of a high grade," mentioned in said section 1 of article 4, is, in fact, the Winnetka academy, for the incorporation of which an act was passed at the same session of the legislature which passed the act for incorporating said village. Private Laws 1869, vol. 1, p. 34. The corporators named in the first section of the last mentioned act, were Timothy

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Wright, Artemus Carter, R. M. Groves, Oliver W. Belden, David P. Wilder, B. Blake, O. S. Goss, Thomas Bassett and James L. Wilson.

The second section provides, that the concerns of the corporation should be managed by a board of nine trustees. The 3d section declared, that the persons named in the 1st section should constitute the first board, and hold their office for two years, and until their successors were elected and qualified.

It also appears from the bill, that the persons composing the council of the village, during the time of the transactions in question, were Artemus Carter, president, Timothy Wright, Barnum Blake, Julius P. Atwood, Thomas Bassett and O. S. Goss, trustees. Of the remaining officers, Abram P. Anthony was collector, and William H. Garland, assessor.

It further appears, from the allegations of the bill, that on the 7th day of May, 1869, the council passed an ordinance to raise money for the purchase of a lot, and making improvements thereon, authorizing the issue of bonds in the sum of \$20,000, by the corporation; that, on the 2d of June, 1869, the council, claiming to act under said 1st section of article 4 of village charter, purchased of said James L. Wilson, block 50, in said village, containing two acres, for \$2500, for the purpose of erecting thereon, as was pretended by them, a building for an academy or college; that, during that summer, and the fall of 1869, they did erect and finish, professedly for educational purposes, a large brick building on said block, inclosed the block with a fence, and made other improvements, at an expense of \$11,800, or thereabouts; that, during the year 1869, but at what particular time the complainants could not state, the council caused to be issued \$18,000 of said bonds, dated in said year, payable ten years after date, with interest coupons for interest thereon, at ten per cent per annum, payable semi-annually at the First National Bank in the city of Chicago; that said bonds were sold by said council at a discount from the face, and yet drew interest upon the

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Statement of the case.

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whole amount named in the bonds, at ten per cent per annum ; that all the consideration received by said village for said \$18,000 of bonds, was the price of said lot, being \$2500, and \$11,800, or thereabouts, the cost of said improvements, making in all \$14,300, or thereabouts ; that the difference of \$3700, or thereabouts, was allowed by said council as discount or shave money in getting the bonds cashed ; that said council sold all, or nearly all, of said bonds, to the individual members of said council ; that Wilson was paid in bonds, in whole or in part, for said lot, and the balance of \$15,500 were sold to the members of said council, by the council, at seventy-five cents on the dollar, or thereabouts, said Carter taking the largest share of them at that rate, or about that rate, and said Goss, Bassett and Wright, taking a portion of them ; that Carter, Bassett and Wright, and other members of the council, and said Wilson, combining together, have so managed the business by keeping their transactions secret, that the complainants have been unable to obtain further information as to the issuing of the bonds, or as to who are the present holders thereof.

The bill further alleges, that after the erection of said building on said block, the council, about the 30th of March, 1870, passed an ordinance for leasing said block and the improvements thereon, to said Winnetka academy, for the term of three years from the 1st of July, 1870, at a nominal rent, the condition of such letting being, that the academy should pay all taxes and assessments on the property; and inasmuch as said building and grounds are by law exempt from taxation, such letting amounts to a free lease of said premises ; that said measure was adopted by the vote of said Atwood, Bassett, Wilder and Wright, and that said Bassett, Wilder and Wright, were at the same time incorporators in said academy, and that, by their action, they thus virtually donated the use of said building and grounds to said academy, for the term of three years, which was, in fact, taking the property of the people and bestowing it upon themselves, without consideration, for



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their own benefit and interest ; that, in accordance with such pretended lease, said academy took possession of said premises July 1st, 1870, and have continued such possession, and are conducting a private school in said building for their own gain and benefit.

The bill further alleges, that said council have not used, had not intended, and never have intended, to use the lands so purchased, or the building or buildings so erected thereon, for an educational institution of a high grade, for corporate purposes ; but that the same was designed by the council for, and has already been appropriated to, the use of the private corporation as aforesaid, for private gain, and wholly foreign to the corporate purposes of said village ; that, on the 7th of October, 1870, the council passed an ordinance directing the levy of a tax of thirteen mills on a dollar of the assessed value of real and personal property, eight mills of which is on account of said bonds, and to pay the interest thereon ; that a warrant had been issued for the collection of said tax, and placed in the hands of said Abram P. Anthony, collector, who threatens to collect said tax by levying on the property of complainants, and that said collector is insolvent.

The bill also alleges, that the assessor completed the assessment of property, real and personal, for the year 1870, in said village, including the property of complainants ; had signed and returned the list to the council about August 1st, 1870 ; that, in said list, he had assessed the property of the Chicago & Milwaukee Railway Company, on track, \$11,500 ; on rolling stock, \$8700 ; that, on September 21, 1870, the council directed their clerk to change said list, making a total reduction of the assessment of the property of said company, for the purposes of taxation, of \$4700, and also directed the clerk to make a reduction of \$550 from the assessed valuation of the personal property of O. S. Goss, one of the members of the council, which was accordingly done. But the bill does not allege that the property assessed as to which the reduction was made, was subject to taxation by the village authorities,

or that Goss participated, as member of the council, in ordering the reduction as to his property.

The bill also alleges that said council have already taken action towards building a large boarding house adjoining said academy, on block 50, and have, by ordinance, provided for issuing additional bonds of said village to the amount of \$8000 for that purpose ; charges that the proceedings of said council and said academy, as therein before set forth, and the proposed erection of said boarding house, and the issuing of bonds, etc., are fraudulent, illegal and unjust, as against complainants as tax payers ; the bill was sworn to, praying for an injunction and relief ; a temporary injunction was awarded ; defendants entered their appearance, and interposed a general demurrer, which was sustained, the injunction dissolved, bill dismissed, and damages awarded against complainants for suing out the injunction. Complainants brought the case to this court by appeal, and assign for error the rulings of the court as stated.

Mr. GEORGE SCOVILL, for the appellants.

Mr. J. P. ATWOOD and Mr. S. A. IRWIN, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court :

The bill in this case is not very artificially drawn, but upon a critical examination of it, we find the defects to be simply the want of chronological order in the statement of facts, and of logical order in the arrangement of the matters of its contents. Notwithstanding these defects in form, we find facts scattered through it, sufficiently stated to entitle the complainants to relief, and the *gravamen* of the whole is very apparent. The substance of the matters alleged is, that while the council were authorized by section 1 of article 4 of the charter, to purchase land and erect buildings thereon for an educational institution of a high grade, to borrow money, issue bonds and levy taxes for that purpose, still, such institution was designed

by the act to be for corporate uses only, or else that portion of the act must be held unconstitutional and void; that the council, though pretending to act under the authority of this act, purchased the land and erected the building thereon, as set forth, with the original design of not having the same appropriated to the corporate uses of the village as an institution of learning, but of directly appropriating it to private use, for the purposes of private gain and emolument—a portion of the members of the council being incorporators and trustees of the Winnetka academy; that, in pursuance of such design, the land was purchased of one of the trustees of the academy, and the building and other improvements placed upon it; bonds of the village were issued to the amount of \$18,500, bearing ten per cent interest, payable semi-annually at a national bank in Chicago; \$2500 of these bonds were delivered to the trustee of the academy of whom the land was purchased, in payment thereof. The balance of \$15,000 in bonds, the council sold at the rate of seventy-five cents on the dollar, to certain individual members of the council, of which Carter, the president of the council, took the largest share. Three members of the council being also trustees of the academy corporation, the council passed an ordinance to lease said land, and the buildings and improvements so purchased and constructed by said bonds, or their proceeds, to said academy—a private corporation, to be carried on as such, for private gain, for the term of three years, upon condition that such academy corporation should pay all taxes and assessments, when such land and property were not legally liable to taxation—the three members of the council, who were trustees of the academy, voting for said ordinance at its passage.

Then, as a crowning act, the council, while certain of its members were purchasers of these bonds at a sale by the council, and must be presumed, in the absence of anything to the contrary, to be still the holders of them, passed an ordinance directing the levy of a tax upon the inhabitants of the village,

and owners of property therein, to pay themselves the interest upon said bonds.

Nor is this all. The bill alleges, and we are bound to take all allegations of fact well pleaded as admitted by the demurrer, that the council are about to erect a boarding house on said land, for the use of said academy, and to that end have passed an ordinance to issue the bonds of the village to the amount of \$8000 for that purpose.

Such, substantially, are the grounds, presented by the bill, for prevention and relief. The court below sustained a general demurrer to the bill, dismissed it, dissolved the temporary injunction which had been allowed and issued upon it, and awarded damages against complainants for having obtained the injunction.

Relief may be granted by courts of equity against a municipal corporation, as well as against a natural person. The first section of the charter of the "village of Winnetka" declares "that by said name, the corporation may sue and be sued in all courts of law and equity in this State."

There are some acts which a municipal corporation, while acting within the limits of its charter, may do, without being subject to the supervision of any court. Such acts are those done under its legislative and discretionary powers.

The question as to the true boundary line between exemption from supervision, and liability to it, has received a thorough and critical examination in the courts of New York. *Milhau v. Sharp*, 15 Barb. 194; *Davis v. Mayor*, 1 Duer, 453. In these cases, it was held that a municipal corporation, in reference to its private property, stands upon the same footing of other corporations; that its corporate property is held in trust for the benefit of its constituents, and the corporation is bound to administer such property faithfully, honestly and justly, and if it is guilty of a breach of trust by disposing of its valuable property, without any, or for a nominal, consideration, it will be regarded in the same light as if it were the representative of a private individual, or of a private corporation; that the

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mere fact in such a case, that the forms of legislation are used in committing such breach of trust, will make no difference in the character of the act. It will not be, in any sense, the exercise of a political power delegated for public purposes, and the privilege of exemption from judicial interference terminates where legislative action ends.

See, also, *Attorney General v. Utica Insurance Co.* 2 Johns. Ch. R. 389.

The council had no authority to purchase land, erect buildings, and issue bonds pledging the corporate property, and the faith and credit of the corporation, for any but corporate purposes. If the original design was, as is alleged, and which the facts stated seem to warrant, to purchase the land, erect the building and issue the bonds, for *private* uses, to the exclusion of *corporate* purposes, and for private gain, it was a gross breach of trust, a fraud upon the law and the tax payers of the village, and a court of equity should take cognizance of the case, by virtue of its inherent jurisdiction over fraud and trusts.

The sale of the bonds of the village, by the council to its own members, was void, irrespective of the principles of equity applied to the dealings of parties holding a fiduciary relation to each other, or of considerations arising from the fact that it was part of a scheme to pervert the property of the corporation from its legitimate corporate uses to mere private ends. It was void, on the ground that no man can contract with himself.

"It is said that the contracts of trustees are of two classes: One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void, from the fact that no man can contract with himself. If, therefore, a board of directors should convey all the property of a corporation to themselves, the conveyance would be void without any inquiry into its fairness, or whether it was beneficial to the corporation or not; and the same rule applies, if a board of directors

convey the property of a corporation, or any part of it, to one of their members, he being one of the trustees negotiating the contract with himself." Perry on Trusts, sec. 207, and cases cited in notes supporting the text.

And inasmuch as three members of the village council were also trustees of the academy, and participated in negotiating the contract for the lease from the former to the latter, it is difficult to perceive any reason why that transaction does not also fall within the principle of the authorities holding void a contract made by trustees with a board of trustees or directors of which they are members. However that may be, the contract should, under the circumstances stated in the bill, be held void, on the ground of its being a fraudulent perversion of the private property of the village, held in trust for corporate uses, from such uses, to those of a mere private enterprise.

It follows, from the views expressed, holding the sale of the bonds by the council to its own members to be void, that such bonds could not be enforced in the hands of such holders, for either principal or interest, and this, upon the ground that, the sale being void, there was nothing due to such supposed holders. If no interest was due upon the bonds in such hands, then it also follows that the levy of the tax by the council to pay it, was illegal, unjust and oppressive, as to the tax payers.

It is insisted, on behalf of appellees, that the demurrer to the bill was properly sustained, on the ground of multifariousness. No such cause is assigned by the demurrer, and we shall not stop to investigate the question of practice, whether the specification of this ground was indispensable; for we are of opinion that the bill is not obnoxious to demurrer for that cause, even if it had been specified.

It is an established rule, that where chancery takes jurisdiction for one purpose, it will retain it for all purposes necessary to complete justice between all parties interested in the subject matter. The policy of the rule is, the prevention of

a multiplicity of suits, and from it has sprung the other rule, which requires all persons interested to be made parties ; so, that to do adequate and complete justice between all parties interested, may be said to be a prevailing motive of equity. This motive, together with a conceded absence of technical rules in respect to the statements of the bill, has ever afforded a fruitful source of perplexing questions as to the proper unity of the matters set forth, their relations to persons and to each other. As civilization advances, and the subtlety of the human intellect increases, the transactions of mankind become more complicated ; but, from a variety of causes, attention to the principles of correct pleading seems to become more lax. From these causes, the difficulty of the questions mentioned seems to continually increase.

It was said by Lord COTTENHAM, that it was utterly impossible, upon the authorities, to lay down any rule or abstract proposition, as to what constitutes multifariousness, which can be universally applicable. 1 Dan. Ch. Pr. 384. So our own great equity judge : "The conclusion," says Story, "to which a close survey of all the authorities will conduct us, seems to be that there is not any positive, inflexible rule, as to what, in the sense of courts of equity, constitutes multifariousness, which is fatal to a suit, on demurrer." Story Eq. Pl. sec. 539. Still, in the same work, sec. 271, he gives the following definition : "By multifariousness in a bill, is meant the improperly joining in one bill, distinct and independent matters, thereby confounding them ; as, for example, the writing in one bill of several matters *perfectly distinct and unconnected*, against one defendant, or the demand of several matters of a *distinct and independent* nature against several defendants in the same bill."

The charge of multifariousness is based, in this case, principally upon the fact of making the collector a party, and the matters alleged as ground for restraining the enforcement of the tax warrant in his hands.

This was not a distinct, independent matter. The tax warrant was the very instrument by which the wrong was to be consummated. The illegal sale of the bonds, by the council to its own members, to raise money to pay for property which they were appropriating to private use, and levying a tax to pay themselves interest upon such bonds, were the matters set forth, showing the wrong and oppression of the tax payers. Making the collector, who had the warrant for the collection of this tax, a party, was upon the same principle that a defendant to a judgment, who should file a bill to set it aside for fraud, would be compelled to make the sheriff a party, if an execution was in his hands, upon the judgment, although the latter in no manner participated in the original fraud.

So, also, the allegations of the bill that the council were proceeding to erect a boarding house for the use of the academy, and for that purpose had passed an ordinance to issue bonds of the village to the amount of \$8000, which would be a charge upon the property of tax payers. To build such a boarding house, would, under the facts stated, be an act in furtherance of the fraudulent scheme of appropriating the private property of the corporation, held in trust for corporate uses, to private uses, and is so connected with the substantive matter of the bill, that, as a branch, it must perish with the trunk.

We are of opinion, however, that the facts stated in regard to the alleged diminution of valuation by the assessor, of property assessed, are not sufficient to defeat the whole tax. There is no allegation that the property in respect to which the council directed the clerk to make the diminution, was subject to taxation by the village authorities, or that Goss, as a member of the council, participated in having the change made as to his property.

Nor is there a case shown for rescinding the purchase of block 50 from Wilson. Improvements have been made upon the land at great expense. Authority was given by the village charter to purchase the land and erect the building for



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corporate uses; so that the purchase was not made without authority. Even if the members of the council designed, from the beginning, to pervert the land and building to private uses, for their own private benefit, and there was fraud in the purchase, the contract with Wilson should not be rescinded, because the parties can not be placed *in statu quo*. He can not be compelled to take the building and pay for it, and it would be inequitable for him to have it, as he would if he took his land back, without paying for it. If the village corporation have title to the land, neither Wilson nor the individual members of the council can ask to have it divested. As to the equities between the corporation and the individual members of the council who illegally assumed to purchase the bonds, we express no opinion, but simply hold, that as the facts appear in this record, such sale was void, and no title acquired by it; that the tax levied to pay the interest on the bonds was illegal, and to that extent the collector should be restrained in the execution of the tax warrant; that the appropriation of the private property of the corporation, held in trust for corporate uses, to the mere private uses disclosed by the bill, was a fraud and breach of trust which calls for the interference of a court of equity; that the bill is not bad for multifariousness, and as it contains matters showing fraud and breach of trust, it can properly be met only by answer.

For these reasons, the decree and order of the court below sustaining the demurrer, dismissing the bill and awarding damages, will be reversed and the cause remanded, with directions to that court to overrule the demurrer and permit the defendants to answer.

*Decree reversed.*

THOMAS A. JACKSON *et al.*

v.

GEORGE P. SPINK.

1. **SHERIFF'S SALE—voidable—adjourned.** A sheriff, after giving the requisite notice of time and place of the sale of land, under an execution, and on the day named in the notice, at the request of plaintiff's attorney, adjourned the sale for one day, when the property was offered and bid in by the plaintiff in execution, and after receiving a deed, the land was sold to third persons, and by *mesne* conveyances came to defendant: *Held*, that such an adjournment did not render the sale void, but voidable by appropriate proceedings commenced in apt time.

2. **SAME—ratification—waiver of irregularities.** The acquiescence in such a sale, by the defendant in execution, for about seven years, must be regarded as a ratification of the irregularity in the sale, and the heirs of the defendant in execution can not take advantage of the non-compliance with the statute in making the sale. Nor can such an irregularity be urged in a collateral proceeding.

3. This irregularity, like the failure to sell in smaller tracts when land is susceptible of division, or selling the land on which the debtor resides before his other lands have been sold, may be waived by the execution debtor.

4. **SAME—return of sale not essential.** It is not necessary to the validity of the sale of real estate, that the officer should make a return of the sale on the execution. The law does not require it. The purchaser may rely upon the judgment, the execution and the sheriff's deed. His title will not be affected by an imperfect return, or the want of a return. The deed is evidence that the law has been complied with, until the contrary is shown. The cases of *Thornton v. Boyden*, 81 Ill. 200, and *Botsford v. O'Conner*, 57 Ill. 72, considered and limited.

5. **CERTIFICATE of register of land office—title subject to levy and sale.** The certificate of the register of the United States land office, of the entry of land, confers such a title on the purchaser as may be levied upon and sold under attachment or execution. Although he may not technically own the fee, he has such a title as is liable to such a sale.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action of ejectment, brought by Thomas A. Jackson, Jonathan Jackson, Oliver Jackson and Mary Jackson Griener, in the circuit court of Cook county, against

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George P. Spink, for the recovery of a tract of land in Cook county. The cause was tried by the court without a jury, by consent.

Plaintiffs read in evidence, register's certificate of the entry of the land in controversy, by Henry S. Handy; the proceedings in an attachment suit, by Henry Green against Handy, in the circuit court of Cook county, resulting in a judgment; a special execution ordering the sale of the land, and certificate of purchase by the plaintiff in execution; a deed from the sheriff to Levi Green, the assignee of the sheriff's certificate of sale, and *mesne* conveyances from him to the father of the plaintiffs. It was agreed, on the trial, that the United States Government issued a patent to Handy on his entry for the land.

The plaintiffs proved the death of their father, and their heirship. They proved payment of taxes under the deed to their father as claim and color of title, etc. The court below found the issues for the defendant, and after overruling a motion for a new trial, rendered judgment against the plaintiffs, from which they prayed and perfected an appeal to this court.

Messrs. SCAMMON, McCAGG & FULLER, for the appellants.

Mr. JOHN BORDEN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellants brought their action of ejectment in the court below, and failed in the suit.

We shall not consider the right to recover under the eighth section of the conveyance act, by proof of color of title made in good faith, payment of taxes and possession.

The chief question is, the goodness of the paper title of the plaintiffs.

Two objections are taken to the sheriff's deed. It is urged that it is void:

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*First.* Because of the adjournment of the sale, by the sheriff, for one day, at the request of the attorney of the plaintiff in the execution.

*Second.* Because, at the time the writ of attachment was levied upon the land, the defendant in the writ had only a register's certificate as evidence of title.

The plaintiffs in the ejectment suit are the heirs of Jackson. He purchased of Ogden and Jones, and they of the grantee in the sheriff's deed.

The defendant was in possession of the land, and claimed title under the heirs of the defendant in the execution.

The plaintiff in the execution was the purchaser at the sale; and the defendant therein survived the sale over seven years, but never complained of the irregularity, nor made any motion to set it aside.

Was the sale void, or only voidable?

The statute which we are now asked to construe, provides that no lands shall be sold, by virtue of any execution, "unless the time and place of holding such sale shall have been previously advertised, for the space of twenty days, by putting up written or printed notices thereof, in at least three of the most public places in the county where the lands may be situated, specifying the name of the plaintiff and defendant in the execution," and also describing the land with sufficient certainty; and if the officer should sell otherwise than in the manner, or without the notice, provided, he shall forfeit \$50 for every offense; but no such offense, nor any irregularity, shall affect the validity of the sale, unless it shall be made to appear that the purchaser had notice of the irregularity. R. S. 1845, p. 302, sec. 11.

If it had been the intention of the legislature to declare all sales void, on account of the mere omissions of the officer, in the discharge of his duty, the addition of a few words would have accomplished the object.

To ascertain the legislative intent, we must look at the entire act. Upon a careful reading of the chapter under consid-

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eration, it will be seen that there was a studied avoidance to declare any act of the sheriff void for neglect of duty.

Besides the requirement as to notice of the sale, the sheriff is required to indorse upon every execution the time of reception; to exhaust the other lands of the debtor, before a levy upon the lands on which he may reside, or his personal property; and to sell the real estate in separate parcels, whenever it is susceptible of division. But it is not said that the omission to follow any of these directions, shall make the sale a nullity. This silence, coupled with the provision that the officer shall be subject to a forfeiture for non-compliance, strongly indicates that these requirements are merely directory to the officer.

A failure to make the proper indorsement, or to sell in proper sub-divisions, would not vitiate a sale, after long acquiescence by the debtor; but there must be, within a reasonable time, a direct application by the party injured, to have it annulled. The language of the statute is as positive, in these instances, as in regard to the notice of the sale.

Look at the effect upon judicial sales, if the law be declared that they are void for want of the exact notice required. Persons would be deterred from bidding if they were bound to prove a strict observance of the statute, and the consequence would be, that property must be greatly sacrificed, or, perhaps, sales entirely checked. Parties would not purchase if they knew that they were compelled, in order to maintain a title, to prove the performance of every duty imposed upon the officer. The necessary consequences would be injurious to both the creditor and the debtor.

There is neither complaint nor proof, in this case, that the land did not sell for its full value. If any injury resulted, it was to the defendant in the execution. He had, unquestionably, the right, upon application and notice in apt time, to have the sale set aside; or he had his remedy against the sheriff, if damnified by his conduct. He has never been heard to murmur; but with full knowledge of the judgment, he acquiesced

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in the sale to the time of his death—more than seven years thereafter. His heirs and their grantee ought to be precluded from claiming any benefit arising from the irregularity, in this action of ejectment.

The plaintiffs in this suit, remote grantees of the purchaser at the sheriff's sale, were purchasers, in good faith, for a valuable consideration, and had the right to rely upon the long and silent submission of the defendant in the execution, to the alleged neglect of the officer, as an acknowledgment that the title was unquestioned.

The very language of the *proviso*, attached to section eleven, shows, conclusively, that the legislature did not intend to declare the sale void on account of any irregularity of the officer. The language is: "*Provided, however*, that no such offense, nor shall any irregularity on the part of the sheriff, or other officer, having the execution, be deemed to affect the validity of any sale made under it, unless it shall be made to appear that the purchaser had notice of such irregularity."

The meaning of this proviso is plain. It says, in express terms, that, if there be no notice to the purchaser of the omission of the officer, the sale shall not be affected thereby.

The mere non-compliance, then, with the statute, does not, of itself, make the sale a nullity; there must be coupled with it, notice to the purchaser.

In one contingency, the sale is not void—not even voidable. Did the legislature intend that the same irregularity should make the sale an absolute nullity, if there were notice to the purchaser, but should not disturb it if there were none?

We think not. The meaning of the statute is, that, where an irregularity exists, known to the purchaser, the debtor may, within a reasonable time, either by motion or bill in chancery, according to circumstances, have the sale set aside.

Counsel for appellee assumes, that, in order to sustain a sheriff's deed, besides the judgment and execution, a return upon the execution must be shown. Such is not the law. The purchaser has the right to rely upon his judgment, execution

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and levy upon the property, and his deed. He can not be affected by an imperfect return, or by the fact that no return whatever was made. The statute says that the deed shall be evidence that the law has been complied with, until the contrary be shown. *Philips v. Coffee*, 17 Ill. 154; *Doe ex dem. Wolf v. Heath*, 7 Black. 154; *Wheaton v. Sexton's Lessee*, 4 Wheaton, 503; *Kinney v. Knobel*, 47 Ill. 417.

It has been fully settled by this court, in cases somewhat analogous to the present case, that a sale under the circumstances is only voidable; can only be corrected by the defendant in the execution; that he must act promptly, and that it can not be disturbed in a collateral proceeding. *Suiviger v. Harber*, 4 Scam. 364; *Philips v. Coffee*, *supra*; *Wimberly v. Hurst*, 33 Ill. 166; *Fergus v. Woodworth*, 44 Ill. 374; *Hamilton v. Quimby* 46 Ill. 90; *Nixon v. Cobleigh*, 52 Ill. 387; *McConnell v. Gibson*, 12 Ill. 128.

In *Trustees v. Snell*, 19 Ill. 156, it was held, that insufficient notice of the time of sale made it voidable only.

In *McCormick v. Wheeler*, 36 Ill. 114, it was decided, in an action of ejectment, that the omission to specify the hour of sale in an advertisement can not be presented as an objection to the sale, by third persons, and that it did not make the sale void.

In *Hamilton v. Lubukee*, 51 Ill. 415, it was held, that a mortgagor must avail himself of an alleged irregularity, on account of a defective notice, and other matters affecting the sale, in apt time; and that the sale was not void, but voidable only.

Want of proper advertisements by the officer, may be waived by the acts of the party. *Griffith v. Bogert*, 18 How. U. S. 158.

It has been decided, by the court of appeals of Kentucky, under a statute requiring notice of all sales to be given by the sheriff, that a failure to advertise according to law, would not make the sale of the land void. *Hayden v. Dunlap*, 3 Bibb, 216.

In *Doe ex dem. Osborne v. Woodson*, 1 Haywood, L. & E., N. C. 24, it was held, that the fact that there was not forty

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days' advertisement, or, that the land was not sold until a day or two after the day appointed, will not vitiate the sale.

See, also, *Turner v. McCrea*, 1 Nott & McCord, 11; *Jones v. Fulgham*, 2 Murphy, 364.

We have been referred to some cases which hold that a deed of the officer is void because the sale was not made in conformity with the statute.

*Curtis v. Swearingen*, Breese, 139, and *Smith v. Cockrill*, 6 Wallace, 756, are in conflict with the view we have taken; but the more recent rulings of this court are in harmony with the rule we have announced; and the statute in force at the time the case in Breese was decided, was wholly different from the present statute.

The facts in the cases of *Thornton v. Boyden*, 31 Ill. 200, and *Botsford v. O'Conner*, 57 Ill. 72, did not require the allusion made in them to a sheriff's sale, and we must regard the remark as *obiter dictum*.

The one was in regard to a trustee's sale, the other an administrator's sale, and it is apparent that the remark relied upon was made merely to illustrate the principle enunciated.

The second point can be more briefly disposed of.

It is contended that the defendant in the writ of attachment had only an equitable interest in the land; that the writ could not be levied upon such an interest; and therefore no title passed to the purchaser.

Without reference to the facts—that the defendant in the writ entered his appearance; that a judgment *in personam* was rendered, and that he had received a patent prior to the rendition of the judgment—we do not think that the certificate of the register of the purchase of the land, evidenced only an equitable interest.

The statute in force at the time declared that the certificate of the register should be deemed evidence of title, and should be sufficient to entitle the purchaser to recovery of the possession of the land, in any action of ejectment or forcible detainer. R. S. 1833, 280.



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When the patent did, in fact, issue, it related back to the inception of the right of the patentee, created by the certificate. *Stark v. Storrs*, 6 Wallace, 402.

The debtor had a title, upon which he could recover in ejectment; which he could alienate; which could be sold on execution; which he could devise, and which could only be defeated by a bare possibility.

In the chapter entitled "Judgments and Executions," it is enacted, that the lands, tenements and real estate of every person shall be liable to be sold upon execution; and, in section three, it is provided, that the legal holder of any certificate of purchase of lands, from the United States, shall be deemed to be within the true intent and meaning of the chapter. R. S. 1845, 301.

The attachment law itself, in the first section, says that the "lands and tenements" shall be attached. But in giving the form of the writ, the officer is commanded to "attach so much of the estate, real and personal," etc.

In view of the entire legislation in reference to these certificates, we may safely hold, that, if they do not constitute a strictly legal title, they are entirely different from a mere equitable interest in land.

A reasonable construction must be given to these various statutes; and it evidently was the object of the legislature to subject lands, purchased from the United States, and for which a certificate had been issued, to levy by attachment as well as by execution.

In *Gray v. McCance*, 24 Ill. 344, it is said, that a party, purchasing land of the United States, to which no pre-emption rights attach, acquires in it a vested right; and that the land becomes the property of the purchaser, and may be aliened and disposed of by him.

In *Carroll v. Safford*, 3 How. U. S. 459, it was held, that, upon payment for the land, and the issue of the certificate, the land was no longer the property of the United States, but of the purchaser; that, though technically the fee might be in

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the United States, the land was real estate in the hands of the purchaser; descended to his heirs, and not to his executors; was subject to tax, "as lands owned by non-residents;" and that the purchaser was protected as fully under the certificate, as under the patent.

If real estate, thus purchased and owned, can be sold "as lands," for taxes, why is it not subject to levy by attachment for debt?

We are of opinion that the levy of the writ of attachment was valid.

There is no necessity to advert to the other questions presented.

The plaintiffs showed paramount title, and are entitled to recover.

The judgment is reversed, and the cause remanded.

*Judgment reversed.*

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| 59  | 412 |
| 53a | 37  |
| 59  | 412 |
| 192 | 887 |

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JOHN B. SMITH

v.

THE BOARD OF SUPERVISORS OF PEORIA COUNTY.

1. **BOND—its execution—surety.** Where a person signed an official bond as a surety, and it was agreed between him and the principal in the bond that it should not be delivered to the obligee until another person, who was named as a surety, should sign the bond, but it was delivered without obtaining his signature: *Held*, that when the surety thus signed and delivered it to the principal, having intended to execute an operative bond, the obligee has the right to presume, in the absence of notice, that the surety had conferred full general authority to deliver the bond. Such an agent may bind his principal to the extent of his apparent authority.

2. **AGENT—of his authority.** A special agent's authority is that which is given by the terms of his appointment, or that with which he is apparently clothed by the character in which he is held out to the world, although not strictly within his commission, and whatever is done under an authority thus manifested, is within the authority, and the principal is bound for that reason. He is equally bound by the authority which he

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actually gives, and by that which by his own acts he appears to give. The principal is responsible for the appearance of authority.

3. When one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss, must sustain it.

4. **NEGLIGENCE.** In such a case, it is not negligence in the obligee to fail to go to the surety and make inquiry whether there are any secret agreements between them not complied with. The surety had reposed confidence in his principal, and the obligee was not required to suspect that the principal was acting fraudulently. The surety, in such a case, runs the risk of the fraud of the principal whom he has intrusted with the delivery of the bond. It is his duty, under such circumstances, to see that the authority he has delegated is not abused, and it is not just or reasonable to permit him to take advantage of its abuse.

5. **BOND—its execution—notice of escrow.** Where such a bond is executed and delivered as an *escrow*, and the condition is not performed, that fact can be shown in defense, or where it is agreed by the principal and surety that the bond shall not take effect until a particular person also signs as surety, and the obligee has notice of the agreement, the fact that such person did not sign as a surety, may be shown in defense. And it is error for the court to refuse to permit the defendant to make proof of such facts, under the plea of *non est factum*.

6. **SURETY ON TREASURER'S BOND—liability of.** Where a county, under legislative authority, levies a tax to build a jail and an alms house, and issues bonds to be sold to raise money for such purpose, and the tax is collected, and the bonds placed in the hands of the treasurer and sold, and the money from both sources comes to the hands of the treasurer, his sureties are liable on their bond for any delinquency in failing to pay out the money according to law. And where county orders, drawing interest, are issued and placed in the hands of the county treasurer, to be sold, and the proceeds applied in redeeming other county orders, and they are sold by the treasurer, the money has been legally raised, and is in his hands as treasurer, and his sureties are liable for its misapplication.

7. **SURETY—on official bond—increased liability.** Where, after a county treasurer has been elected and given bond, the county authorities, under laws existing at the time, and a special act of the general assembly subsequently passed, authorizing the levy of a tax and the erection of an alms house, proceeded to levy the tax and to construct such a building, such action did not impose such additional liability as would release the sureties on the treasurer's bond. They will be presumed to have become sureties, knowing that such acts could and might be done during the official term of the treasurer. Such sureties are liable for the faithful performance of all duties of such an officer, whether imposed by laws enacted previous or

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subsequent to the execution of the bond, only so that it comes within the scope of his official duty.

8. **PAROL EVIDENCE—settlements—balances and general results.** In such an action, where books and papers given in evidence are voluminous, it is not error to permit a witness, who has made computations therefrom, to testify to balances and the results of such computations, and to settlements made by the treasurer and the board of supervisors, but it is error to permit him to testify to a report of the finance committee made in the absence of the treasurer, and in which he had not participated, and to which he had not assented.

**APPEAL** from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

Mr. JULIUS S. STARR and Mr. S. D. PUTERBAUGH, for the appellants.

Mr. H. GROVE, and Messrs. JOHNSON & HOPKINS, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of debt, brought by the board of supervisors of Peoria county, against John B. Smith as one of the sureties on the official bond of Thomas A. Shaver, late county treasurer of Peoria county, to recover for an alleged defalcation of said treasurer.

The bond bears date December 18, 1867, and is joint and several; the name of Richard S. Cox is inserted in the body of it, as one of the sureties, but it is not executed by him. Shaver continued in office, exercising its duties, until November, 1869.

The non-execution of the bond by Cox, is made the first ground of defense.

The 15th, 25th, 26th, and 27th pleas, set up that the bond was signed by the defendant, on condition that it should also be executed by Cox as a co-surety, before the same should be delivered; that Cox failed to execute the bond; that in violation of said condition, the bond was delivered to the plaintiff without the knowledge or consent of the defendant.

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The 27th plea varies from the others, in having the additional averment, that the other co-sureties signed the bond on the same condition.

The 15th and 26th pleas aver, that the plaintiff had notice of the facts stated in them, at the time of receiving the bond.

The 3d plea sets up the delivery of the bond to John D. McClure, county clerk, as an *escrow*, to be delivered to the plaintiff only in the event of the above condition being complied with.

Demurrers were sustained to all these pleas, and the first point made is, upon this ruling of the court.

We will first notice the 25th and 27th pleas, which do not contain the averment of notice on the part of the plaintiff of the alleged arrangement therein set forth.

A question is raised upon the phraseology of these pleas, whether it imports that the defendant signed the instrument on the condition, or only on the promise of Shaver, and on the faith that it should not be delivered to the obligee until signed by Cox, in which respect some authorities make the distinction, that in the former case the defense is good, but not in the latter. But we will allow the pleas the full benefit in this respect, and regard them as setting up a conditional delivery to Shaver. In considering the pleas, we shall leave out of view the fact of Cox's name appearing in the body of the bond, as whether it be a circumstance which should have put the obligee upon inquiry, and from which notice might be implied, is a question of evidence only, and not to be considered on a question of pleading. It is but evidence tending to show notice, not conclusive evidence of notice. The pleas should aver notice, not evidence of notice.

The question, then, which we shall consider as the one arising under these pleas is, whether, when a surety who signs and seals a bond, and then delivers it to the principal obligor, upon the condition that it shall not be delivered to the obligee until it has been also signed by another co-surety, and the principal delivers it to the obligee in disregard of the condition, the

obligee having no notice of the condition, and there being no circumstances which should put him on inquiry, does the instrument become operative as the deed of the surety?

This is a controverted question, upon which there is a conflict of authority. In recent decisions, it has undergone full discussion, and the authorities have been fully reviewed.

We shall not undertake to go over the ground, nor to do more than state generally the views and conclusion which we have been led to adopt, and notice to some extent the authorities sustaining them.

There is a line of authorities, among which may be found *The People v. Bostwick et al.* 32 N. Y. 445, and *Bibb v. Reed*, 3 Ala. 38, which deny the legal liability of a party signing an instrument under the above circumstances; and the legal ground upon which the decisions are rested, is this: that delivery to the person in whose favor it is made, is a circumstance essential to the completion of every deed; that there is no delivery by the signer himself, and that the person in whose hands he intrusted it, to deliver only in the event of a certain condition being performed, is a special agent for that purpose; and that the law is, if a special agent exceeds the authority conferred on him, the principal is not bound by his acts, it being the duty of the party, dealing with such a one, to ascertain the extent of his authority; and that hence, the delivery of the instrument by the agent to the obligee, before the performance of the condition, would be an unauthorized act and a nullity, and the instrument would not become the deed of the party who had affixed his name and seal to it; that the case depends upon the actual authority committed to him who was intrusted with the deed.

But this rule of law, as to a special agent, is attended with the qualification, that the agent is not held out as possessing a more enlarged authority, Story on Agency, sec. 126 and note; and is not this just that case?

The several persons whose names and seals were attached to the bond, were connected together in effecting a common

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object, the giving of an operative instrument to the party named in it as obligee ; the act of one, in furtherance of it, may reasonably be taken as the act of all ; they sign and seal the instrument for the purpose of its going into the hands of the obligee as their deed ; the actual possession of it must be held by some one of them, and it must be actually delivered by the hands of some one of them ; the principal obligor, naturally the chief actor, presents it for the acceptance of the obligee ; the instrument is in the regular channel of delivery ; the appearance which the signers of it have created by their acts, is that of an absolute authority in the principal obligor to deliver the instrument as and for what it purports on its face to be, the deed of those who have affixed their names and seals to it.

And though there was no actual authority to deliver the deed at the time, before the performance of the condition, an implied authority to deliver it, we think, should be held to have been given by the acts of the party signing.

In the case of *Pickering v. Busk*, 15 East, 38, Lord ELLENBOROUGH, C. J., holds the following language : "I can not subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the validity of which is afterwards to be tried by the fact. It is clear, that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal, in respect to the subject matter."

Mr. Parsons, in his treatise on Contracts, states the rule thus : "An agent's authority is that which is given by the terms of his appointment, notwithstanding secret instructions ; or, that with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Whatever is done under an authority thus manifested, is actually within the authority, and the principal is bound for that reason ; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. \* \* The appearance of the authority

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is one thing, and for that the principal is responsible." 1 Pars. on Cont. 44.

In behalf of the rule which holds to the liability of the surety in such a case, the principle laid down in the case of *Lickbarrow v. Mason*, 2 T. R. 70, is invoked, that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss, must sustain it.

But, in *The People v. Bostwick et al. supra*, the just application of that principle to such a case as the present, is denied, on the ground that the one who claims the benefit of it, is himself guilty of negligence. But holding, as we do, a view different from the one in that case, as to the necessity of an actual authority in order to bind the surety by the delivery, we fail equally to perceive that there was negligence on the part of the obligee, in not ascertaining the extent of the authority of Shaver, the principal obligor.

We do not consider, that the obligees should have looked upon him as being about to practice a fraud upon his co-obligor, and that it was their duty to go to the surety and ascertain whether the principal was about to defraud him by his act. There was nothing, surely, in the relation of the obligors, to awaken a suspicion that the one meditated a wrong toward the other. Being so associated as they were, implied means of knowledge as to trustworthiness; the surety had reposed trust in his co-obligor, why should the obligee distrust him?

There is no actual negligence imputable to the obligee, and there is none other than the technical neglect of not ascertaining the extent of the actual authority of a special agent. And as we hold, the duty of so doing did not exist, in this case the obligee is not chargeable with even such neglect.

We regard the case as one where the surety must run the risk of the fraud of his own agent. We deem it the duty of the signer of an instrument, under such circumstances, to see to it that the authority he has so delegated is not abused, and



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that it is not just nor reasonable to allow him to take advantage of its abuse to defeat his obligation.

The following are cases affirming such view: *Deardorf v. Foreman*, 24 Ind. 481; *The State v. McCarty*, 31 id. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Smith v. Moberly*, 10 B. Mon. 266; *State v. Peck*, 53 Maine, 284; and see also, as bearing upon the same principle, *Bartlett et al. v. The Board of Education*, *ante*, p. 364.

In *Deardorf v. Foreman*, *supra*, in pronouncing upon a similar question, the court say: "The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him, shall be regarded as the real authority; and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety." This case, as well as *The State v. McCarty*, *supra*, are especially noteworthy, as they discard the contrary rule which had previously been laid down by the same court in the case of *Pepper v. State*, 22 Ind. 399, a well considered case, in which the authorities were extensively reviewed.

In the case of *Smith v. Moberly*, *supra*, this language is used by the court: "But a delivery of a writing of this character, under such circumstances, to the principal, does not have the effect of characterizing it as a mere *escrow*, but on the contrary, the principal should be considered as the agent of the surety, and empowered by him to pass the writing to the person to whom it may be made payable, and his delivery as being sufficient to make it effectual, unless the payee had notice of the special terms upon which it was signed. The implied discretionary authority to use the note, arising out of its possession by the principal, uncontradicted by its terms or any thing apparent on its face, can not be restricted by any agreement between the payors themselves, of which the payee had no notice."

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The supreme court of Vermont have also held, that where a note, payable to a bank, was signed by a principal and one surety, with an agreement on the part of the principal, with such surety, that he would procure another surety, which was not done before he procured the note to be discounted, it will constitute no defense, unless the officers of the bank were cognizant of such agreement. *Passumpsic Bank v. Goss*, 31 Verm. 315. This seems opposed to the decision of the same court, in the case of *Fletcher v. Austin*, 11 Verm. 447, laying down the contrary rule in the case of a bond, and generally cited among the class of opposing cases. But the court, in the latter case of *Passumpsic Bank v. Goss*, place their seeming departure from the former one, on the ground that, in the former case, the instrument was incomplete upon its face, which was a circumstance that affected the obligee with implied notice of the condition which the surety had imposed upon the delivery of the bond.

The rule denying the validity of the defense set up in these pleas, we find sustained by the weight of respectable, if not prevailing, authority. We regard it as the just one; and the contrary rule, allowing makers of a joint instrument to defeat their obligation by setting up violated secret arrangements, made amongst themselves, and unknown to the obligee, appears to us an unsafe one, too. It would seem like opening a convenient way whereby, in very many cases which might be found to arise, those so disposed might be enabled to escape from the performance of their just engagements.

Reference has been had, on the argument, to the evidence on the trial, as bearing upon the merits of the pleas, which, of course, can not be looked to, in determining the question of the sufficiency of the pleas. It must be decided upon the inspection of them alone.

It follows, that the demurrers were properly sustained to the 25th and 27th pleas.

The 3d plea is one in regular form, of the delivery of the instrument to a third person as an *escrow*, with the condition

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unperformed. The 15th and 26th pleas aver notice. We think these last named three pleas contain good matter of defense. Nevertheless, the special demurrers to them were properly sustained, under the ruling of this court in the case of *The Governor etc. v. Lagow et al.* 43 Ill. 135, as the plea of *non est factum* was in, under which the facts alleged in these pleas might have been given in evidence.

Upon the trial, the defendant offered to give in evidence, by certain witnesses, all the facts set up in the pleas to which demurrers had been sustained, and the evidence was rejected by the court. In justification of this ruling, it is said, such offer of evidence was too general and sweeping. It might be so, ordinarily, but not, we think, in view of what had transpired in the case. The court was aware of the contents of the pleas, they having been under its examination in deciding upon the demurrers to them; and as they had been held on demurrer not to constitute a defense, there was reason to believe it would be so held upon the introduction of them in evidence; and we regard the offer as but a matter of form, in order to save the rights of the defendant under the decision of this court in *Curtiss v. Martin*, 20 Ill. 558, that where a demurrer is sustained to a special plea, if the facts alleged in it could be given in evidence under the general issue pleaded, the presumption would be, that they had been admitted under the general issue, unless the bill of exceptions showed that the evidence was offered on the trial and rejected by the court.

It does not appear that the demurrers were sustained upon the ground that their subject matter might be given in evidence under the plea of *non est factum*, and we might infer the contrary, from the offer of the evidence being in such a form.

We think it just ground of complaint, as error, that the defendant, by the ruling of the court, was deprived of the opportunity of asserting the defense set up in these three pleas.

The second branch of the defense in this case is, that the only moneys in the hands of Shaver, the principal, which he

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failed to account for and pay over, were funds of such a character that his sureties are not liable for his failure to pay them over.

There are three classes of these funds: the proceeds of the sale of certain bonds of the county of Peoria, issued to raise money for building an alms house, and taxes levied for the same purpose.

The proceeds of certain bonds of said county, issued for the purpose of raising money to build a sheriff's house and jail.

The proceeds of certain interest bearing orders, issued by the board of supervisors of said county, for the purpose of raising money to take up county orders.

The condition of the county treasurer's bond was, that he should "faithfully execute the duties of his office, and pay, according to law, all moneys which shall come to his hands as such treasurer," etc.

The township organization act of February 20, 1861, makes it the duty of the county treasurer "to receive all moneys belonging to the county, from *whatever source they may be derived*, \* \* and to pay and apply such moneys in the manner required by law." Sess. Laws, 1861, p. 239, sec. 4. Section 3, p. 235, of the same act, gives counties the capacity "to make such contracts, and purchase and hold such personal property as may be necessary to the exercise of their corporate or administrative powers."

By the 17th section of the act entitled "Paupers," Gross' Stat. 474, it is enacted that "The county (commissioners') court in each county, is hereby authorized (whenever it shall see fit so to do) to establish a poor house;" and sec. 19, *ibid.* empowers such court, from time to time, if it shall see fit, to levy and collect a tax not exceeding one-fourth of one per cent on the taxable property of the county, for the purchase of not exceeding six hundred and forty acres of land, and the erection and furnishing of buildings suitable to a poor house.

The board of supervisors are the legal successors to the county commissioners' court. *Green v. Wardwell*, 17 Ill. 281.

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Section 14, p. 238, of the township organization act, provides, "It shall be the duty of the several boards of supervisors, as often as it shall be necessary, to build court houses and jails, or cause the same to be repaired, in their respective counties, at the expense of such counties."

In addition to these general provisions of law, all existing at the time this bond was entered into, there was also a special act passed February 9, 1857, authorizing the board of supervisors of Peoria county to build a court house and jail, and to issue bonds of the county to the amount of \$100,000 to pay for the erection of the same.

On the 26th day of March, 1869, which was after the execution of the bond, the legislature passed an act authorizing the board of supervisors of Peoria county to build an alms house, and to issue bonds of the county to the amount of \$60,000 to pay for the erection of the same.

The pleas setting up the second branch of the defense, as respects the said bonds and interest bearing orders, aver that they were placed in the hands of Shaver, as agent, to negotiate for the county, and that the money derived from their sale was no part of the funds required to be accounted for by the county treasurer, for which the defendant was liable; but the pleas fail to negative the receipt of the money as county treasurer, as is averred in the declaration, and in that respect are bad, and it is enough upon that point to refer to the case of *Green et al. v. Wardwell*, 17 Ill. 279, being an action upon the official bond of a justice of the peace for a failure to pay over money collected in his official capacity, where it was similarly averred in a plea, that the notes and accounts there in question were not left with the officer as justice of the peace; and the court, in holding the plea bad, say, "It is of no moment in what capacity he received the evidences of the debts. The question is, in what capacity did he receive the money? The declaration charges him with receiving the money as a justice of the peace, and this is not denied by the plea." The question does not respect a liability of the treasurer for these bonds

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or orders, but for the money proceeds of them, which came into his hands from their sale.

As to the taxation for the purpose of building an alms house being without authority of law, there seems to be a special warrant for it in the provision cited, authorizing the levy of a tax not exceeding one-fourth of one per cent, for the purchase of land and the building of a poor house.

It is urged, that the money arising from the interest bearing orders, was money borrowed without authority, upon county orders bearing ten per cent interest. These orders seem to have been issued and disposed of, to take up other county orders. The transaction, in substance, was no more than taking up one form of indebtedness by issuing another in the place of it. In *City of Galena v. Corwith*, 48 Ill. 424, it was held, that a municipal corporation has the right to pay its debts, or provide for their payment, to fund them if that be deemed the best policy, and issue the necessary evidences thereof.

Ample power to issue the bonds to pay for the building of a sheriff's house and jail, is found in the special act for that purpose, of February 9, 1857.

A point is made here, that the authority was to issue bonds for the purpose of building a *jail*, and not a *sheriff's house and jail*. We will not intend that, as used in this connection, the "sheriff's house" was to be a separate building, disconnected from the jail, for the residence, merely, of the sheriff, but we shall take the language of the pleader most strongly against him, and hold "sheriff's house and jail" to mean but a single structure, for the safe keeping of prisoners, and the lodgings of the sheriff or jailor having them in charge.

It is insisted, that subsequent to the execution of the bond, the liability and risks of the defendant, as such surety, were materially increased by the plaintiff, and also by an act of the legislature, without the knowledge or consent of the defendant, whereby he became discharged.

We see nothing in the case to lend countenance to any such claim, except the special act of the legislature, of March 26

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1869, authorizing the plaintiff to issue the bonds for the erection of an alms house. As respects the proceeds of these bonds, it may be said a risk and liability has been cast upon the defendant which could not have arisen under any law in existence at the date of the bond. But the building of an alms house was a necessary county purpose. At the date of the bond, it was by law made the duty of the board of supervisors to build one, and the legal intendment must be, that it was in the contemplation of the surety when he executed the bond, that such an alms house might be built during his principal's term of office, and that the necessary means therefor might come into his hands, and that he assumed his obligation in reference to such a contingency. Upon this subject, as to affecting the liability of the surety of an officer by imposing additional duties upon him by subsequent legislation, the well settled principle is thus declared in the case of *Governor of Illinois v. Ridgway*, 12 Ill. 14:

"The sureties of an officer, upon his official bond, are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to, and come within the scope of the particular office, and not for those which have no connection with it, and can not be presumed to have entered into the contemplation of the parties at the time the bond was executed."

See, also, *Compher v. The People*, 12 Ill. 290; *The People v. Leet et al.* 13 id. 268; *The People v. Villas*, 36 N. Y. 459.

We hold it no ground of legal objection, that a portion of these moneys came into the hands of the treasurer in consequence of this subsequent legislation.

We consider that all these funds belonged to the county, and came into the hands of the county treasurer for necessary county purposes; that they were derived from no extraordinary source, but by means of the necessary and proper exercise of the administrative powers of the county through its board of supervisors; it was, by law, made the duty of the

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county treasurer to receive all moneys belonging to the county, from whatever source they might be derived, and liability, in respect to these moneys, was within the true scope of the bond.

The question upon this liability was presented in the forms of pleas, objections to evidence, and instructions, and it is sufficiently disposed of in all these respects, by saying, that the demurrers to all the pleas setting up this branch of the defense, were properly sustained.

It is objected, that the summary statements of the various accounts made by the witness West, the deputy county clerk, were improperly admitted in evidence.

The original books kept by Shaver himself, in his capacity as treasurer, and the books of the county court, his settlements with the board of supervisors, and all the original books and papers from which these statements were made, were given in evidence. The books and accounts were voluminous, and so far as the statements were the results of mere computations from the books and papers, having been verified by the oath of the witness, we think they were properly admitted in evidence. They were of great use to the court and jury in determining, with greater dispatch and convenience, the true condition of the books and accounts; in fact, it would have been almost impracticable to have done so without such aid.

Mr. Phillips, in his work on Evidence, with Cowan & Hill's notes, 5th Am. Edit. vol. 1, p. 491, under the head of "Inquiry as to general mode of dealing," lays it down thus: "Inquiry has been allowed in some cases, as to a general mode of dealing, or as to the general result of an examination of accounts, and such other matters where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in court." And on the next page it is stated, that "a witness may give evidence of a general balance of accounts."



But so far as any statement was made up from the reports of the finance committee, without any evidence of Shaver's assent to their correctness, it was incompetent evidence.

One such report was made after his term of office had expired. The repeated use of the word "defalcation," too, in the statement, was objectionable, as tending to the prejudice of the defendant.

For errors which have been indicated, the judgment is reversed and the cause remanded.

*Judgment reversed.*

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FAUNTLEROY F. FRANS

v.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.*

HARRISON B. FRANS *et al.*

WRIT OF ERROR TO A COUNTY COURT—*whether it will lie.* A writ of error will not lie from this court to a county court to bring in review an order of that court removing a party from his office of administrator of an estate, and requiring him to pay over a sum of money found to be due the estate.

WRIT OF ERROR to the County Court of Knox county ; the Hon. DENNIS CLARK, Judge, presiding.

Messrs. HANNAMAN & KRETZINGER, for the plaintiff in error.

Messrs. BAILEY & COLE, and Messrs. CRAIG & HARVEY, for the defendants in error.

Per CURIAM : This is a writ of error to the county court of Knox county, to bring in review an order of that court, of removal of the plaintiff in error from his office of administrator of the estate of Peter Frans, deceased, and requiring him to pay over a certain sum of money.

Does this writ of error lie?

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In the case of the *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 487, a writ of error to the county court was entertained to review an order of that court for a sale of real estate at the instance of the administrator, for the payment of debts. The county court had been given jurisdiction concurrent with the circuit court, in applications of that character, and as no appeal was allowed from such an order to the circuit court, it was held to follow, necessarily, to prevent a failure of justice, that error should lie to this court.

In *Hobson et al. v. Paine*, 40 Ill. 25, a writ of error to the county court of Warren county was brought, to bring in review the action of that court in appointing an administrator of an estate; and for the reason that in that case an appeal could have been taken to the circuit court, the court refused to entertain the writ of error.

And for the same reason that an appeal from the order in the present case might have been taken to the circuit court, this writ of error, as in the last cited case, must be dismissed for want of jurisdiction.

*Writ of error dismissed.*

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THE OMAHA NATIONAL BANK

v.

THE FIRST NATIONAL BANK OF ST. PAUL.

1. LETTER OF CREDIT—*extent of liability thereon.* A bank gave a letter of credit to a person, guaranteeing the payment of drafts which might be drawn by the latter on a firm named in the letter, to the amount of \$14,000, the letter providing that endorsements might be made thereon. The person to whom the letter was given, made a draft for \$8000, which was endorsed on the letter. He then drew for \$2000, which was also endorsed on the letter. This draft was forwarded for collection to the bank giving the guaranty, which was advised by letter that it was drawn under the letter of guaranty. The holder of the letter then made a draft for \$4000,

which was not endorsed on the letter, nor, in sending the bill for collection to the same party as before, was any reference made to the letter of guaranty; but the draft was paid by the drawees. He then drew for \$6000, the draft purporting on its face to be drawn against the letter of credit, which was returned to the bank which gave it, with this draft, for collection. This last draft was protested. All the drafts except the first were drawn in favor of the same party. In a suit by the latter upon the guaranty, to recover the amount of the draft for \$6000, which was protested, it was *held*, the defendant was not liable, because, on the payment of the previous drafts, amounting to \$12,000, it was exonerated from liability on its guaranty, except to the extent of \$2000, the residue of the amount guaranteed.

2. However different the rule might have been had the last draft been sold to a person who had no knowledge of the prior draft for \$4000, which was not endorsed on the letter of credit, and who should purchase on the faith of that letter, yet, in the case of the plaintiff, who had knowledge thereof, the omission of such endorsement could not avail to charge the guarantor beyond the amount specified in its letter of credit.

3. *RECOVERY under the common counts.* In such case the plaintiff could not recover, on the common counts, even to the extent of \$2000, the residue of the amount named in the letter of credit. The defendant's liability arose only from the guaranty, and that should have been declared upon specially.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. FULLER & SMITH, for the appellant.

Messrs. THOMPSON & BISHOP for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

On the 14th of September, 1868, the First National Bank of St. Paul issued to C. W. Nash the following letter of guaranty:

"FIRST NATIONAL BANK, ST. PAUL, MINN., }  
Sept. 14, 1868. }

"To whom it may concern:

The bearer, Chas. W. Nash, Esq., whose signature is herewith, may wish to draw drafts upon Messrs. Merriam & Wilder

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of this city, for a sum not exceeding fourteen thousand dollars (\$14,000), and the same will be duly guaranteed by this bank. Endorsements may be placed on this letter of advice.

Signature of

Respectfully,

C. W. NASH.

J. E. THOMPSON, Pt."

On the 19th day of September, 1868, Nash drew a bill for \$6000, to the order of the State Savings Association in St. Louis, on Merriam & Wilder, which was endorsed on the letter of guaranty.

On the 26th day of September, 1868, he drew another bill on Merriam & Wilder, in favor of the Omaha National Bank, the plaintiff herein, for \$2000, which was also endorsed on the letter. This draft was forwarded for collection to the defendant, the First National Bank of St. Paul, with a letter, advising that it was drawn under the letter of guaranty. The draft itself made no reference to the guaranty.

On the 19th of December, 1868, Nash drew another bill, for \$4000, in favor of the plaintiff, on Merriam & Wilder, which was also forwarded to the defendant for collection, and duly paid by the drawees. This bill was precisely like the preceding, with the exception of the date and amount. The plaintiff, however, in sending the bill, made no reference to the letter of guaranty, nor was the bill endorsed on the letter.

In July, 1869, Nash drew another draft, for \$5000, in favor of the plaintiff, which was also sent to the defendant for collection, returned protested, and charged by the plaintiff to Nash, who had, in the meantime, engaged in an extensive business at Omaha, in the way of government contracts, keeping his account with the plaintiff. On the trial, the cashier of the plaintiff testified, that this bill was also drawn on Merriam & Wilder; but in his affidavit, subsequently made in support of the motion for a new trial, he swore that, on returning to Omaha, he found it was drawn on Wilder alone. In the view we take of the case, however, this draft becomes immaterial.

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On the 31st of December, 1869, Nash drew on Merriam & Wilder another draft, in favor of plaintiff, for \$6000, to make good his bank account. This draft purported on its face to be drawn against the letter of credit, and having been forwarded, like the others, to the defendant for collection, was returned protested. With this draft was sent the original letter of guaranty, which was returned to the plaintiff with the words "guaranty withdrawn January 27, 1870," written upon it. It appears, from the correspondence between the two banks, that Merriam & Wilder instructed the defendant not to pay this draft, and agreed to hold it harmless against all loss. Some stress is laid upon this fact by plaintiff's counsel, but we do not perceive that it affects the legal liability of the defendant.

This suit was brought upon the guaranty, to recover the amount of this draft for \$6000. If the draft of the 19th of December, for \$4000, when paid, exonerated the defendant from liability on its guaranty to that extent, it is manifest there can be no recovery in this suit. There would remain a liability only to the extent of \$2000, and the defendant could not be required to pay a draft for \$6000. The Superior Court held the draft for \$4000 must be so applied, and so instructed the jury—thus causing a verdict for the defendant. The plaintiff appealed.

It was proven on the trial, by the president and cashier of the plaintiff, that it is a universal custom among bankers, when a bill is drawn on the faith of a letter of credit, to either advise in the body of the draft, or in the letter transmitting it, that the bill is so drawn. That was not done in reference to the \$4000 draft. It is conceded, by counsel for appellant, that, under the terms of the letter of guaranty, in this case, the liability of the defendant would have been discharged as soon as Merriam & Wilder had paid the drafts of Nash to the extent of \$14,000, if drawn under the letter of guaranty and endorsed thereon. It is, however, insisted, in a very ingenious argument, that, as the bill for \$4000 was not endorsed on

the letter of credit, and as no reference was made to the guaranty, either in the body of the bill, or in the letter transmitting it for collection, the defendant would not have been liable for the payment of that bill by virtue of the guaranty, and can not claim that its liability was discharged to the extent of this bill, upon its payment by the drawees. In this argument we can not concur.

What was the undertaking of the defendant? It was expressed in a written instrument, and in terms not ambiguous. It was, simply, that Merriam & Wilder should pay drafts, drawn upon them by Nash, to the extent of \$14,000; and if they should not, the bank would pay, but would not be liable beyond that sum. Before the bill in controversy was drawn, the defendant had collected \$12,000 from Merriam & Wilder, on bills drawn upon them by Nash, and had transmitted the proceeds to the payees. The very terms of the defendant's undertaking had then been complied with to the extent of \$12,000, and to that extent it might hold itself discharged from its liability, unless a state of facts should be shown, rendering it necessary, in the maintenance of justice, to carry the undertaking of the defendant beyond its strict letter, by saying that it should not be permitted to treat the \$4000 draft as falling within the terms of its contract. If, for instance, the draft for \$4000, not having been endorsed upon the letter of guaranty, Nash had presented that letter to a banker who knew nothing of that draft, and had sold to him his draft for \$6000, being the amount apparently unexhausted upon the letter, it might have been contended, with great force, that, as the defendant had collected the former drafts, and remitted their proceeds, without seeing that the \$4000 draft was endorsed upon the letter of credit, it had been guilty of such carelessness as to preclude it from setting up that draft against a person dealing with Nash, without any knowledge, or means of knowledge, of its existence.

But it is precisely at this point that the plaintiff's case breaks down. The plaintiff knew, when it received the draft in suit, that Merriam & Wilder had paid, as the defendant agreed they

## Opinion of the Court.

should pay, the drafts of Nash to the extent of \$12,000. When the plaintiff forwarded to defendant the \$2000 draft, it advised the latter that the bill was drawn by virtue of the letter of guaranty. The \$4000 draft was drawn a short time thereafter, and in precisely the same terms; but the letter transmitting it said nothing of the letter of guaranty. Yet, the defendant had a right to presume that the plaintiff took that draft, as it had taken the former one, on the faith of the letter, and to insist that, so far as the plaintiff was concerned, the guaranty was discharged to the extent of \$12,000. It is said, the plaintiff did not take that draft on the credit of the guaranty. It is unnecessary to inquire whether it discounted it on the credit of Nash, or that of the defendant. It knew the draft fell within the terms of that letter, and that, when it should be collected and accounted for by the defendant, the latter would have the right to consider its guaranty discharged to that extent, and to adjust its dealings with Merriam & Wilder, upon that basis. From that time, the plaintiff could claim no right, upon discounting a draft drawn by Nash on Merriam & Wilder, to be protected as a purchaser might be who had bought such draft in ignorance that the bill for \$4000 had ever been drawn. The plaintiff can only appeal to the letter of the contract. It occupies no vantage ground. It has been cognizant of whatever has been done, and has been in no respect misled by the defendant. It knew the defendant had only guarantied the payment by Merriam & Wilder of bills drawn by Nash, to the extent of \$14,000, and that they had paid such bills to the extent of \$12,000. On what ground, then, can this plaintiff claim the guaranty shall be so construed as to cover another draft for \$6000?

It is urged that the defendant could not have been compelled to pay the \$4000 draft, if Merriam & Wilder had not done so, because it was not endorsed on the letter of guaranty. Without deciding whether the letter of guaranty should receive that construction, it is sufficient to say, if that draft had not been paid by Merriam & Wilder, the plaintiff and Nash,

by endorsing it upon the letter of guaranty, could, undoubtedly, have enforced its payment by the defendant. The provision in the letter, that "endorsements may be placed on this letter of advice," was intended, we suppose, to secure the defendant from being called upon to pay drafts discounted upon the faith of the letter, and in ignorance that the amount specified in the letter had already been exhausted. This was a proper precaution; and conceding that the defendant might have declined to pay the \$4000 draft, until endorsed on the letter of guaranty, it could waive this right, without injury to itself, so long as Nash should deal only with persons cognizant that such a draft had been drawn and paid. This was what it in substance did. It received for collection a draft drawn by Nash on Merriam & Wilder, from a party aware of the guaranty. Such drafts it had agreed should be paid. It collected the draft and remitted the proceeds. It might have been more prudent, with reference to the possible dealings of Nash with other persons, to require the endorsement of the draft upon the letter; but such prudence was not necessary in reference to the present plaintiff. It is more than probable that the defendant supposed an endorsement was made, but that was an act to be done by the drawer and payee, and, as against them, it could not affect the defendant's rights whether the act was performed or omitted. They had the power in their own hands to compel the defendant to respond upon its guaranty for the amount of the draft, by placing an endorsement, at any time, on the letter in their possession; and because the draft was paid without such endorsement, the plaintiff can not be permitted to say that the defendant can take no benefit from its payment.

Much of what we have said, applies to the argument based upon the evidence of the custom among bankers, when a draft is discounted on the faith of a letter of guaranty, to give notice of that fact to the guarantor. Admitting that to be the custom, we are of opinion, for the reasons already given, that it can not affect the decision of the present case. The payment



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of the draft for \$4000, by Merriam & Wilder, was a payment within the terms of the guaranty, whether the letter in which plaintiff sent that draft to the defendant alluded to the guaranty or not.

We have not reviewed any of the authorities cited by counsel, because they really furnish but little aid in the determination of the case. Though various questions may be raised, the controlling one is, whether, before this draft was drawn, the defendant had discharged itself from liability upon its guaranty to the extent of \$12,000, as against this plaintiff. It seems to us plain, that, to that extent, its contract had been performed, and the plaintiff knew it.

If the defendant had given to Nash a letter, stating that he had \$14,000 in its vaults, which would be paid upon his drafts, and that such drafts could be endorsed upon the letter of credit, and if the plaintiff, knowing that the defendant had already paid \$12,000 on the drafts of Nash, though upon drafts making no allusion to the letter and not endorsed upon it, should discount another draft for \$6000, and claim payment by virtue of the letter, could we hesitate as to the judgment that should be given? The actual case is not substantially dissimilar from the one supposed. The defendant had promised to the public that the drafts of Nash, on certain persons, to the extent of \$14,000, should be paid. They had been drawn and paid to the extent of \$12,000, when the draft in controversy was drawn, and that fact was known to the plaintiff. As to it, the contract was discharged, except as to the surplus of \$2000, and that can not be recovered in this suit. It is claimed by appellant's counsel, that the plaintiff should have been permitted to recover, at least, the \$2000 on the common counts. This, however, can not be done. The defendant's liability arises only from the guaranty, and this must be declared upon specially.

*Judgment affirmed.*

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Syllabus.

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## EUGENE B. MYERS

v.

EUGENE L. GROSS *et al.*

1. *CONTRACT for the sale of an edition of books—construction thereof.* A publisher of a book entered into a contract with a bookseller, by the terms of which the latter was to advertise the book in his circulars and lists, for which, and for his commissions on all sales made by him, he was to receive twenty per cent of the gross receipts, to be deducted month by month, at which times he was to account and pay over to the publisher the residue. It was also agreed that the bookseller should sell the entire edition, the publisher reserving "the privilege of selling at retail what few copies might be demanded through him, without commissions to the bookseller." It was *held*, that while it was for the jury to say, from the number of the edition and all the circumstances of the case, what number should be regarded as a "few copies," which might be sold by the publisher without commissions to the bookseller, it could not have been intended to embrace in the reservation so large a proportion of the edition as to exceed one-third thereof.

2. Nor had the publisher the right, under the contract, to advertise the book and solicit orders for its sale,—that was clearly prohibited, by the spirit, if not by the letter of the contract.

3. Should the publisher, in such case, sell at retail more books than he was authorized to sell under the agreement, the bookseller would be entitled to his commissions on the residue the same as if he had sold the books himself.

4. It seems, after the making of this contract, by an understanding between the parties, a bill was introduced in the legislature, providing for the purchase, by the State, of a certain number of copies of the book. The bill, as originally drawn, provided that the books should be purchased from the bookseller, who agreed with the publisher to accept half commission on the books to be sold to the State. Subsequently the publisher procured the bill to be so amended that the books should be purchased directly from him: *Held*, this change in the law did not operate to deprive the bookseller of his right to his commissions on the sale to the State, as it did not matter, under their agreement, by which of the parties the books were furnished.

5. *RESCISSION OF CONTRACT for non-performance.* A party to a contract who is himself first in default, can not declare the contract at an end by reason of non-performance by the other party.

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6. So, in this case, the publisher violated the contract by refusing to account to the bookseller for his commissions on books sold beyond the number the former was authorized to sell under the contract, and thereby the bookseller was justified in refusing to pay the drafts of the publisher for proceeds of sales he had made himself, without forfeiting his right to have the contract fully executed.

APPEAL from the Superior Court of Cook county ; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. J. V. LE MOYNE, for the appellant.

Messrs. BECKWITH, AYER & KALES, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of assumpsit, brought by appellees, in the Superior Court of Cook county, against appellant, to recover a balance on the sale of books by the latter for the former. The declaration contained a special, and the usual common counts. The cause being at issue, was submitted to the court for trial, by consent of parties, without the intervention of a jury. After hearing the evidence, the court found the issues for appellees and assessed their damages at \$1,169.36, and rendered a judgment therefor in their favor ; and defendant prosecutes this appeal from that judgment.

On the 17th day of July, 1868, the parties entered into a written agreement by which appellant, who was a bookseller, bound himself to advertise the book, which was a compilation of the statutes of Illinois, in his circulars and lists, such as might be needed to sell the same promptly, for which, and for his commissions, appellees agreed to pay him twenty per cent of the gross receipts from all sales he should make, to be deducted month by month, at which times he was to account to, and pay over to appellees, the remaining eighty per cent of the proceeds of all such sales. It was agreed that appellant should sell the entire edition at the price of \$8 per copy, which was subsequently raised to \$10, and to have his imprint thereon as publisher. It was further agreed, that "Gross Brothers reserve the privilege of selling at retail what few copies may

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be demanded through them, without commissions to Myers ;" and the expense of boxing the books and transporting them to Chicago, was to be equally shared between the parties.

The agreement does not name the size of the edition that was being published, and to which it referred, but it states it to be a contract in reference to an edition of the statutes of Illinois, which appellees then had in press. It is conceded that the agreement referred to the first edition, and the evidence shows that it consisted of one thousand volumes, but it seems it was increased some forty copies. This, then, fixes the number that was embraced in the contract. The difference between the parties seems to have grown out of the sales by appellees to individuals and the State, upon which appellant claims commissions, and which appellees insist he is not entitled to under the agreement. Of the one thousand and five copies which appellees admit were printed, two hundred and ninety-four were sold to the State, and of the remaining seven hundred and eleven, appellant sold three hundred and sixty-two, leaving three hundred and forty-nine unaccounted for, unless they were sold by appellees. Should appellant's claim that appellees account to him and pay commissions on the copies sold by appellees, be allowed? Appellant was entitled, by the terms of the contract, to sell, and receive commissions on, the entire edition, except the few copies that might be demanded of appellees, upon which he was to receive no commission. We can not presume appellant for a moment supposed that the expression, "a few copies," could be construed to embrace so large a number. It is a question for the jury to say, from the size of the edition, and all the circumstances of the case, what number should be regarded as a few copies. But it is manifest that appellees could not sell, under that reservation, over one-third of the edition. Nor had they, under the agreement, any right to advertise the books for sale, and solicit orders for their sale. This is clearly prohibited by the spirit, if not the language, of the contract. This calculation is based on the number appellees admit the edition contained,

but other evidence places it at a higher number ; but the true number published, is for the jury to determine.

It, then, follows that appellees, by selling at retail more than the contract authorized, violated the agreement. It is apparent that they had sold, or made some other disposition of the books, at the time of their last interview with appellant, as they then informed appellant that there was not enough of the edition to supply the State the five hundred copies it had authorized the Secretary of State to purchase. And we find this to have been true, as not quite three hundred were, in fact, delivered, and they were then distributing them among the members of the general assembly. It thus appears that appellees had broken their part of the contract, as they had made these sales and had failed to account to appellant for the commission which he was entitled to receive on such sales as though sold by himself. Even admitting that appellant remitted his commissions on one hundred and thirty-three copies thus sold, as appellees contend he did, still it would leave two hundred and sixteen copies sold by them upon which they have paid no commission, if we take the lowest number which they claim was published. This being the case, they were not in a position to declare the contract at an end. A party, when in default, has no power to say the contract is at an end, and refuse to proceed with its execution. As appellees had violated the agreement, and had failed to account for commissions of appellant, in their hands, when they drew upon him and he refused to pay, they had no power, for that reason, to declare the agreement at an end.

We now come to the question, whether appellant was entitled to any commission on the two hundred and ninety-four copies, sold to the State, of that edition. Appellant had the power to prevent a sale to the State, unless he should get his regular commission under the agreement ; but it seems he agreed to take half commission on such a sale, if it could be effected, at the time the bill was introduced authorizing the purchase to be made of appellant. We fail to find that he

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ever agreed to reduce the amount, or to remit his claim for half commission on that sale. Nor could the change of the bill, as it finally passed, authorizing the purchase to be made from appellees, in the slightest degree affect his rights. If it was understood that he was to have half commissions for a sale under the bill as first introduced, we are at a loss to perceive any rule of law by which he lost the right when appellees had the bill amended so as to authorize them to make the sale. The purpose and object of the parties was to make the sale to the State, of that edition, and it could not matter in the slightest degree which formally consummated it. On its being accomplished in either form, appellant had the right, when payment was made, to receive ten per cent on that sale.

The court below excluded both the item for commissions over and above a few copies sold by appellees, and not remitted by appellant on their settlement, and the item of ten per cent on the sale to the State. In this there was error. The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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WILLIAM BROUGHTON

v.

## ELECTA SMART.

1. **CONFLICT OF TESTIMONY**—*want of preponderance*. A party holding the affirmative of a proposition is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other. The plaintiff's case, under such circumstances, is not proved.

2. **ACTION for services**, *when no charge was intended to be made*. In an action to recover for work and labor, it appeared the plaintiff was the sister-in-law of the defendant, and made her home at his house, and it was

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Syllabus. Statement of the case.

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*held*, that, if she did not intend to charge for what services she rendered in the family, but regarded the same as a donation, or an equivalent for living at defendant's house, she could not recover therefor.

3. *REMEDY*—*where one purchases land and another takes the title.* If a person purchases land and another takes the title in his own name, the real owner, it may be, may have a claim in equity to recover the land, but the nature of the claim in that regard can not be investigated in an action of assumpsit.

4. *NEW TRIAL*—*verdict against the evidence.* In this case, in which one of the issues presented the question whether the defendant promised to marry the plaintiff, it was held a verdict for the plaintiff was not supported by the evidence.

APPEAL from the Circuit Court of Livingston county ; the Hon. CHARLES H. WOOD, Judge, presiding.

This was an action of assumpsit, in which the declaration, among other alleged causes of action, contained a count for work and labor. The basis for this count was certain services performed by the plaintiff in the family of the defendant while she was making her home at his house. On this branch of the case, the court below refused the following instruction asked by the defendant :

"3d. If the jury believe, from the evidence, that the plaintiff made her home at the defendant's during the time that she claims pay, for services, from the defendant, and that what services she rendered during such time, she did not intend to charge the defendant for, but regarded the same a donation, or as an equivalent for living at defendant's house, then the plaintiff can not recover for such services in this suit."

This ruling of the court is assigned as error.

The other features of the case are sufficiently presented in the opinion.

Mr. L. E. PAYSON and Mr. C. J. BEATTIE, for the appellant.

Messrs. PILLSBURY & LAWRENCE, and Mr. L. G. PEARRE, for the appellee.

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Opinion of the Court.

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Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit. The declaration counts upon a promise by the defendant to marry the plaintiff on request; on a promise to marry plaintiff in a reasonable time; on a promise to marry her in the fall of 1869; and a count for use and occupation, goods, wares and merchandise, the money counts, and account stated.

On leave to amend the declaration, the plaintiff added a count alleging seduction and abandonment by the defendant.

To the first four counts the general issue was pleaded, and issue joined, and a plea of set off to the common counts; and to the additional count, not guilty was pleaded and issue. Thus the strange anomaly is presented in an action of assumpsit, of an issue made up on a plea of not guilty. There is, however, no point made on this.

The jury found for the plaintiff and assessed her damages at \$10,000. A motion for a new trial was entered; thereupon the plaintiff entered a *remittitur* of \$5000, and the court overruled the motion for a new trial, and rendered judgment on the verdict.

To reverse that judgment, the defendant appeals.

We have examined the record with great care, and have reached the conclusion that the verdict was not warranted by the evidence, nor can it be regarded as the unimpassioned expression of deliberate judgment.

There is no sufficient proof of any promise to marry. The plaintiff testifies there was, while the defendant, in the most positive manner, under oath, asserts the contrary.

A party, holding the affirmative of a proposition, is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other. The plaintiff's case, under such circumstances, is not proved.

But it is urged that the plaintiff's testimony is corroborated by her nephew, E. M. Smart, whose rambling and confused



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Opinion of the Court.

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statements scarcely rise to the dignity of testimony. Nor does that of William Clapp, who was called to prove admissions by the defendant, go to show a promise of marriage.

The defendant is sustained, in some degree, by the testimony of his half brother, Samuel Broughton, who states that, in the fall of 1869, the plaintiff told him, in a conversation he then had with her, that she was not engaged to be married to the defendant; that defendant had never asked her to have him. She further said she knew he did not intend to marry her. In the same conversation, she said, in a joking manner, she was going to set her cap for a man named Barunters. This talk was after plaintiff left defendant's house.

Margaret Beattie testifies that plaintiff was living at her house in 1869, in Round Grove, and she had a conversation with her, in which plaintiff said defendant had never asked her to marry him, but she depended upon what Sarah had said. This was in the fall of 1869.

The plaintiff does not explicitly deny this conversation with Samuel Broughton, but says she don't think that conversation ever occurred. Now, such a conversation was had, or it was not had. Samuel Broughton testifies in the most positive manner it did occur; and if it did not, plaintiff could, as positively, have so stated. Mrs. Beattie's testimony is not questioned.

As to the testimony of this witness, and as explanatory, it is necessary to state that plaintiff was the sister of the defendant's deceased wife, Sarah, who, on her death bed, had desired plaintiff to remain with her family and take care of the children. Sarah also said she had talked to William about it, and that Broughton had promised to treat her well, and that after her death he would give plaintiff all the rights that belonged to her, Sarah. Plaintiff also states that she could not say that defendant had any knowledge of that conversation at the time. We infer from this, that it was on the faith of a promise made by the deceased wife of defendant, that plaintiff based her

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Opinion of the Court

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claim that defendant should marry her, and on the strength of which she demanded compliance on his part.

It may be, as William Clapp testified, that he might have married her, if she had not been in such a hurry; he did not talk about a promise to marry, he only talked of what might have been.

We fail to perceive, in the whole record, any sufficient evidence of a promise to marry made by the defendant to the plaintiff.

In a contract so important as that of marriage, there should be sufficient evidence to establish the fact. The bare, unsupported testimony of an artful, designing woman, should not, for the safety of society, be permitted to prevail against the positive denial of the party sought to be charged. If great caution is not observed by juries in such cases, the property of no unmarried man in the community is secure to him who should have the misfortune to seek the company of females, some one of whom, by her own unaided testimony, may make him her victim.

Doubtless, the jury in this case more easily reached their conclusion, from the fact, to which the plaintiff willingly testified, that, from the time she had reached the twenty-eighth year of her age, a matured woman, living in her sister's family, she had, not unwillingly, received the unlawful embraces of the defendant for more than ten years up to 1869, the year of her sister's death. She states, herself, defendant had frequent intercourse with her, "time and again," for ten years before her sister's death. After her death, on defendant's persuasion, she would leave her bed and go to the defendant's. She says he forced her, by force of argument, which she explains by saying defendant declared he would kill himself if she did not consent, and when he was dead she was to take his body to New York and bury it by the side of his mother's. This is too absurd and farcical to engage the sober attention of any court or jury.

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Opinion of the Court.

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The claim of seduction and breach of marriage promise is clearly an after-thought. The action was not brought originally on any such theory, but is the subject of an additional count, to which the plea of not guilty was interposed.

There does not appear to us any ground whatever for the pretence that the seduction was the consequence of a promise to marry. If there was any seduction, it must be remembered the plaintiff was, at its first inception, a full grown, mature woman, at least twenty-eight years of age, and knew full well the character of the acts to which she submitted, and her guilty paramour was the husband of her sister, and incapable of making a promise to marry another. From all that appears, she was a willing victim to the defendant's lust, and to the gratification of her own. She says herself that, during this illicit intercourse of ten years prior to the death of her sister, one word from her would have stopped it all at any moment. That word she would not and did not utter.

We can perceive no merits in the plaintiff's claim. She never engaged in the service of the defendant, but lived with him as one of the family, never expecting to charge him for such trifling services as she may have rendered. On this point the defendant's third instruction should have been given, and it was error to refuse it.

It may be, in equity, plaintiff may have a claim to recover the land which she alleges she purchased, a deed for one half of which the defendant took in his own name; but in this action, the nature of her claim in this regard can not be investigated, and we express no opinion about it one way or the other.

On this record we are satisfied the plaintiff ought not to recover.

The judgment of the court below is reversed and the cause remanded for a new trial.

*Judgment reversed.*

## Syllabus.

## VALPEAU ROOSA

v.

## HENDERSON COUNTY.

1. *ROADS—action of county court—not subject to review.* In counties not under township organization, the county courts have the discretionary power to locate and establish public roads. They are made the judges of the public necessity of such roads, and this discretion, when once exercised, is not subject to review by the circuit court. The statute gives no appeal from such cases except upon a final order directing the road to be opened after the damages have been assessed.

2. In such a case, the county court has power to vacate the order establishing the road at any time before it is directed to be opened. If, on the damages being assessed, the court believes them to be too high, or that the condition of the county would not justify the expenditure of so large a sum of money, they may reverse and set aside the former proceedings, and refuse to order the road opened.

3. *APPEAL—hearing in the circuit court.* On the coming in of the report of the commissioners, of the assessment of damages and its confirmation, and the final order for the opening of the road, the statute gives the party the right to appeal to the circuit court, where, on the hearing in that court, the regularity of the proceedings in the county court may be questioned, as well as the assessment of damages. If such proceedings are irregular they will be reversed, and the county court will proceed *de novo*; but if correct, then the question to be tried on the appeal is, as to the damages.

4. *SAME—evidence.* Where a party appeals from the final order approving the report of damages sustained by property owners, the party may introduce any legitimate evidence to show the extent of such damages. But where an appeal is prayed and perfected in such a case, before the damages are assessed and the road ordered to be opened, the appeal is premature, and the circuit court has no jurisdiction, original or appellate, in such a case, to hear evidence and assess damages.

5. *APPEAL—prematurely taken—effect of judgment.* Where an appeal in such a case is thus taken, when none is given or allowed, and the circuit court proceeds to try the case, and judgment is rendered against the party appealing, for costs, the judgment would constitute no bar to his rights in the premises, and such judgment may be regarded as, in effect, but a dismissal of the appeal.

WRIT OF ERROR to the Circuit Court of Henderson county;  
the Hon. ARTHUR A. SMITH, Judge, presiding.

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Opinion of the Court.

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Messrs. J. H. & W. K. STEWART, for the plaintiff in error.

Mr. J. SIMPSON, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a proceeding to lay out and establish a public road in the county of Henderson. That county is not under township organization, and the proceedings were had in the county court.

A petition, signed by the requisite number of voters, having been presented, asking to have a public highway laid out and established over a certain route described, the county court granted the prayer of the petition so far as to appoint viewers.

At a subsequent term, the viewers made their report in writing, laying out and establishing a public road as asked for in the petition, according to a plat and survey attached to the report. This report was by the court approved, and the road declared duly established, and ordered to be opened "subject to claims for damages." From this order thus made, establishing the road, the plaintiff in error prayed an appeal to the circuit court, which was allowed, and the appeal accordingly perfected by the filing of a bond, with the security required by the court.

On the trial of this appeal in the circuit court, the appellant, among other things, offered to prove the amount of damages which he would sustain by reason of the construction of the road over certain lands owned by him, which evidence the court refused to allow him to give. The decision of the court, rejecting the evidence offered by the plaintiff in error, is now assigned for error.

The appeal from the county court to the circuit court, was prematurely taken.

The act of laying out and establishing a public road, is a matter of discretion with the county court. The legislature has seen fit to invest the county court, in counties not under township organization, with the power to determine when

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Opinion of the Court.

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there exists a public necessity for laying out a new road, and whether the financial condition of the county will justify the expenditure of the money necessary to open it to public use; and their discretion, when once exercised, can not be reviewed in the circuit court.

The statute has provided no appeal from the action of the court in such matters, except from the final order directing the road to be opened, after the damages, if any are claimed, shall have been assessed under the statute. The reason is obvious. It is lawful, even after the damages have been assessed by the commissioners, or on an appeal in the circuit court, if, in the opinion of the county court, the damages are too high, or that the financial condition of the county will not justify the expenditure of so great a sum of money, for that court to vacate the order establishing the road, and thus avoid the payment of the damages. Hence, there is no necessity for an appeal by a party aggrieved by any previous proceedings or orders. Such party can not know that the road will be opened to public use until the damages shall have been assessed, and the final order made directing the proper officers to open it upon the payment of such damages. It will be time enough then for the aggrieved party to take an appeal. *County of Sangamon v. Brown et al.* 13 Ill. 207.

It appears from the record, that after the appellant had taken his appeal to the circuit court, the county court, at the same term, under the provisions of the statute, appointed commissioners to assess the damages that he would sustain by reason of the construction of the road across his premises. At the next term, the commissioners made their report, in which they say that the plaintiff in error would sustain no damages over and above the benefits conferred on his land by the construction of the road, which report was by the court approved.

From all final orders approving the assessment of damages, and directing the road to be opened on the payment thereof, the party aggrieved, under the express provisions of the statute, has the right to appeal to the circuit court. On the trial

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Opinion of the Court.

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of such appeals, the regularity of the proceedings in the county court, in laying out and establishing the road, may be inquired into, as well as the question of damages. If the proceedings shall be found to be irregular, they will be reversed, and the county court directed to proceed *de novo*. On the other hand, if the proceedings shall be found to be all regular, the only question to be tried in the circuit court will be the question of damages. *The County of Sangamon v. Brown et al. supra.*

Had plaintiff in error appealed from this order of the county court approving the report of the commissioners appointed to assess the damages which he would sustain by reason of the construction of the road, then the evidence tendered in the circuit court would have been proper, and it would have been error in the court to have rejected it. This he did not do. He attempted to appeal from an order where no appeal is authorized by law, and none will lie. The circuit court has no original jurisdiction to hear and determine the question of damages, and can only obtain it on appeal. Nor can original jurisdiction be conferred on the circuit court by consent. There was, therefore, no case pending in the circuit court to be tried, where the evidence tendered by plaintiff in error could be heard.

The appeal was improperly taken, and it was the duty of the circuit court to have dismissed it. There was a trial in the circuit court, and a finding against plaintiff in error, on which judgment was rendered against him for costs. That judgment, however, would constitute no bar to any rights the appellant may have had in the premises. There being nothing before the court to be tried, the judgment against plaintiff in error for costs may, in effect, be regarded as a dismissal of the appeal, and the judgment must be affirmed.

*Judgment affirmed.*

## HARVEY B. HURD

v.

## GRANT GOODRICH.

1. **EQUITY—practice—default—reference to the master—exceptions to his report.** Where a bill is filed to compel an account, and the defendant fails to answer, is defaulted, the case referred to the master to state the account, and the defendant failed to object before the master, and excepts in the court below, this court will not, where the account is intricate, attempt to state it. The party desiring to have the rulings of the master in receiving and rejecting evidence, or the principles adopted in stating the account, reviewed, should file objections before the master, pointing out the grounds with reasonable certainty, which, if disallowed by the master, may be reviewed by filing exceptions to the report, in the circuit court, for the same reasons urged before the master.

2. The exceptions in the circuit court are always based on, and confined to, the objections urged before the master. They are regarded as in the nature of a special demurrer, and must specifically point out the grounds of objection. This court will not, as a general rule, consider any objection to a master's report, unless exceptions were taken in the court below.

3. **MASTER'S REPORT—facts—exceptions.** When the master reports the facts correctly, but misapplies the law, in such a case it is not necessary that exceptions should be filed; but this is an exception to the rule.

4. **INTEREST—rests.** As a general rule, the master, without directions from the court, can not, in computing interest, make rests; but there are some exceptions to the rule of practice. Where the facts stated in the bill, and taken to be true by the default, require rests in computing interest, and they are allowed by the master without objection, and the report is confirmed, the objection can not be raised in this court. A trustee is only chargeable with compound interest where he has been guilty of gross negligence, as when the trustee has used the money of the *cestui que trust* for his own purposes, and, it is presumed, with profit.

5. **TRUSTEE—compensation—for services.** Where the account of a trustee is referred to the master for adjustment, and he has failed to claim compensation for his services as trustee, by answer to the bill, or presenting his claim before the master, when adjusting his account, he has no power for the first time to raise the question in this court on error.

6. **DECREE—altering or setting aside.** Where the decree is signed and filed for record, or where it is ordered by the court to be recorded, and is duly filed for record by the clerk, and the term has expired, it becomes a matter of record, and can not be altered or amended on motion, except as a mere matter of favor, or quite of course.



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Statement of the case.

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WRIT OF ERROR to the Superior Court of Cook county ;  
the Hon. JOHN A. JAMESON, Judge, presiding.

On the 18th day of December, 1866, Goodrich exhibited in the Superior Court of Chicago, his bill in chancery, against Hurd, alleging, in substance, that, on the 17th day of June, 1853, Hurd executed, under his hand and seal, and delivered to Goodrich, a certain declaration of trust, whereby Hurd declared that, on the 7th day of January, 1852, he purchased at administrator's sale, at public auction, certain real estate, describing it (being, in all, two hundred and forty acres), one half of the purchase money being paid down, and a bond and mortgage executed for the balance payable in six months, and therein and thereby acknowledged and declared that he held said premises in trust as follows: One undivided half of said premises in trust for the benefit, use and behoof of Goodrich, his heirs and assigns; the remaining undivided half for the benefit and behoof of Brown & Hurd, comprising the firm of Andrew J. Brown and Harvey B. Hurd, the respective parties paying their proportion of the purchase money, and with the further understanding that Hurd might sell said lands or the timber thereon, according to his best judgment, he accounting to the respective parties in interest, or their legal representatives, for their proportionate shares of the money realized from such sales made by him, the balance of one-half unsold to be conveyed to Goodrich on request. The bill alleges the payment of a blank sum on and toward his share of the purchase money; that Hurd, in pursuance of the trust, proceeded to sub-divide the land into parcels and offer it for sale; that a large share thereof was timbered land of great value; that Hurd, from time to time, sold timber off of portions of it for large sums of money, without sale of the fee, but to whom, when and in what quantities, and for what price, complainant was not informed; and sold different and separate parcels of the land to various persons for large sums of money; that he had received, from time to time, large sums

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Statement of the case.

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of money and interest, etc., but to whom, when, in what quantities, and for what price, complainant was not informed, nor as to what part remained unsold; that Hurd failed to pay over to complainant the share belonging to him, but mingled the same with his own money, and laid out the same in the purchase of other lands and lots on which he made large profits and gains; that, during all the time he was receiving moneys from the sale of the timber and lands, he was engaged in buying and selling lands, and complainant's share thereof was mingled with the money with which such purchases were made, on and through which Hurd, as such trustee, made large profits and gains; that, during all the time money was sought for upon loans, could have been readily loaned upon undoubted security, for interest at the rate of ten per cent per annum, payable annually or semi-annually.

Alleges that Hurd had accounted to, and settled with Brown; alleges that complainant made a demand upon him, in 1854, to account and pay over, and repeatedly since. Bill called for answer upon oath, and prayed for discovery and an account, special and general relief.

On the 20th December, 1866, Hurd entered his appearance in the cause. Afterwards, and on the 14th of March, 1867, Goodrich, by leave of court, amended his bill; and on the 1st day of July caused a summons to be issued to Hurd to appear and answer, which was returned personally served on the 11th of July, 1867.

On the 17th of October, 1867, complainant took a rule upon Hurd, to plead, answer or demur to the amended bill, on or before the following Monday morning. He not having complied, on the 28th of October, 1867, a rule was obtained, requiring him to show cause why an attachment should not issue. On the 25th day of October, 1869, complainant, by leave of court, again amended his bill by striking out the call for answer upon oath, and expressly waiving the same; and on the 8th of December, 1869, took another rule upon Hurd, to plead, answer or demur to the amended bill within

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Statement of the case. Opinion of the Court.

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twenty days; and on the 29th of March, 1870, Hurd's default and a decree *pro confesso* were entered, and the cause referred to the master to take proofs, state and report account as prayed in the bill. Upon notice to Hurd, the parties appeared before the master and proofs were taken. On the 29th day of March, 1871, the master filed his report in the cause, stating the account between the parties, with the proofs and exhibits adduced before him, the result of which was, that Hurd was then indebted to Goodrich in the sum of \$5940.02.

On the same day of filing the master's report, a rule was taken, requiring Hurd to show cause, if any he had, by the next Monday morning, why the master's report should not be confirmed.

No exceptions having been taken to the master's report, at the April term, 1871, the court made and entered a final decree, confirming the master's report, and decreeing the payment of the amount thereby found due as above stated.

At the May term, 1871, Hurd made a motion, based upon affidavits, and as to which there were counter affidavits, to set aside the decree of the April term, which was overruled by the court. The matters were preserved in the record and the cause brought to this court by writ of error.

Mr. JOHN A. HUNTER, for the plaintiff in error.

Mr. SIDNEY SMITH, for the defendant in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

We have examined the record in this case, and the several points made by plaintiff in error, for reversal, with all the care which the importance of the case, in respect to the amount and principles involved, seemed to demand; and we are satisfied that no one of the points made is tenable, and that, under the circumstances of the case, plaintiff in error has no just cause to complain of the action of the court below in any respect. The bill of complainant sets forth, with

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Opinion of the Court.

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clearness and certainty, facts sufficient to constitute a case for relief under the most familiar head of equity jurisprudence. The complainant, by calling for a discovery and answer under oath, gave plaintiff in error an opportunity of being a witness in his own behalf in respect to matters peculiarly within his own knowledge, and as to which, from the long lapse of time and the nature of the transactions, it would have been very difficult for complainant to have adduced much, if any, opposing evidence. The bill was filed on the 16th of December, 1866. On the 26th of the same month, plaintiff in error entered his appearance in the cause. The bill was then amended, and on the 1st day of July a summons was issued, which was duly served on the 11th of the same month, for the next August term. Then, although there was a term of the court commencing on the first Monday of every month, no rule was taken upon him to answer until the October term, 1867. The rule was taken on the 7th of that month, and no attention being paid to it, on the 28th of the same month a rule was taken upon him to show cause, by a certain day, why he should not be attached for contempt. Still he did not answer. Then, upon the 25th of October, 1869, complainant, having obtained leave of the court for that purpose, struck out that part of the bill requiring an answer upon oath, and substituted the usual waiver of the oath, and on the 8th of December, 1869, took still another rule upon plaintiff in error, to plead, answer or demur to the amended bill within twenty days. Then, waiting until the 29th of March, 1870, and no steps having been taken to defend the suit, the default of plaintiff was entered, and the usual decree *pro confesso*, with a reference to the master to take, state and report the account between the parties. Notice of the proceedings before the master was given. On the 29th of March, 1871, the master's report was filed, which recites the appearance of plaintiff in error before him. After the filing of the report, and on the same day, a rule was entered, requiring plaintiff in error to show cause, by a particular day, if any he had, why the report should not be confirmed. No

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Opinion of the Court.

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exceptions were ever taken to the master's report, and, at the April term, 1871, a final decree was entered, confirming the report and decreeing the payment of the amount found due, within thirty days, and awarding execution therefor.

It is apparent, from the record, that plaintiff in error was unwilling to answer the bill, either upon oath or without it. By the default, he admitted every matter of fact in the bill, well pleaded. Plaintiff in error is an attorney of this court, of long practice, and must, therefore, have personally known that such would be the effect of a default. He had abundant opportunity to answer, failed to do so, and must, therefore, have intended to submit to all the consequences of a default. He neither made objections before the master, nor filed exceptions in the court below, to the report, but comes into this court, and insists that the amount found due by the master, was, for several reasons, too large. The report shows an intricate and complex matter of account between the parties. Such an account is an unfit subject for examination in an appellate court. In *Dubourg v. United States*, 7 Peters, 625, the court, Chief Justice MARSHALL delivering the opinion, said: "We are of opinion that a complex and intricate account is an unfit subject for examination in court, and ought always to be referred to a commissioner, to be examined by him and reported in order to a final decree," and for want of such reference and report, the decree of the district court was reversed. But of what avail would the reference and report be in the case of complex accounts, if the whole matter were open to review upon error, without exceptions in the court below? Consistently with the convenience of courts of equity in this respect, their mode of procedure requires the party, who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence, or the principle upon which an account is stated, to file objections to the master's report before it is returned into court, pointing out the grounds with reasonable certainty; then, if the master still adheres to his rulings and report, and returns it into court, the party

## Opinion of the Court.

objecting may then file his exceptions to the report, corresponding with the objections made before the master, upon the hearing of which the whole, or such part of the evidence as may be material, will be brought forward and be subject to review by the court. *McClay, Adm'r, v. Norris*, 4 Gilm. 370; *Brockman v. Aulger*, 12 Ill. 277.

The exceptions are always to be confined to such objections as were allowed or overruled by the master. *Copeland v. Crane*, 9 Pick. 73; *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. R. 81; *Byington v. Wood*, 1 Paige, 45.

They are regarded as in the nature of special demurrers, and the party objecting must point out the error. *Wilkes v. Rogers*, 6 Johns. R. 566; *Story v. Livingston*, 13 Peters, 359; *Dexter v. Arnold*, 2 Sumner, 108.

As a general rule, this court will not consider any objections to a master's report unless exceptions were taken in the court below. *Whitesides v. Pulliam*, 25 Ill. 285.

Where the master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding to except to the report, as the question decided by the master may be opened, upon further directions, without exceptions. 2 Dan. Ch. Pr. 1492.

This is an exception to the general rule, but this case does not fall within it, for it is not a case where the master states the facts. The objections to the master's report are made for the first time in this court. They embrace three separate grounds:

"First—The statement of the account, with annual rests."

"Second—The refusal to allow plaintiff in error compensation for his services."

"Third—The ruling of the master in respect to what is called the Anderson & Brown purchase."

First, then, as to the statement of the account with annual rests: There was no direction to the master in this respect, in the interlocutory decree; and, as a general rule, the master is

## Opinion of the Court.

not at liberty to make rests in the account unless directed to do so by the decree. 2 Dan. Ch. Pr. 1434; *Webber v. Hunt*, 1 Mad. 18. The question therefore arises whether, having made the rests in the account without any previous direction to do so, the decree, under the circumstances of this case, should, for that reason, be reversed.

If the facts set out in the bill, and admitted by the default, afford a sufficient ground for the rests in the statement of the account, then, even if plaintiff in error had made objections before the master, and filed exceptions to the report upon its being returned into court, it would have been entirely competent for the court below to have made the direction *nunc pro tunc* and overruled the exception. But, not having filed any exceptions, and the report of the master having been confirmed by the court below, it is to be presumed that the court made such confirmation in view of the facts alleged in the bill and admitted by the default, rather than upon what was shown before the master. If such facts were sufficient to warrant the allowance of compound interest, the court below was right in confirming the report, and, notwithstanding the want of directions to the master, this court will not reverse for that reason. A trustee is chargeable with compound interest only in cases of gross delinquency. *Clarkson v. Depeyster*, 1 Hopkins' R. 424. As where he refuses to account. *Myers v. Myers*, 2 McCord Ch. R. 214, 266; or, where he has used the money of his *cestui que trust* for his own purposes, and there is an actual or presumed gain of the trustee by the use of the funds. *Schreffelin v. Stewart*, 1 Johns. Ch. R. 620; *Ringgold v. Ringgold*, 1 Harr. & Gill, 11. The bill shows plaintiff in error to have been a trustee by virtue of a formal declaration of trust. The case so made could not be varied by proof before the master; therefore the question of partnership is not in the case.

The allegations of the bill also show that the trust was created in June, 1853; that Hurd began to sell the trust property immediately after; that he received large sums of money

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from such sales, belonging to Goodrich ; that, during the year 1854, and from time to time, at short intervals since, the latter repeatedly and persistently requested and importuned Hurd to account with him concerning his said trust and the moneys received by him, and to pay the same over ; that sometimes Hurd professed his inability to do so without great sacrifice ; at others he would promise to account, and pay over as soon as he could make out the account ; at other times he would pay small sums, with the assurance that he would speedily render such account, which promises he failed to keep ; and recently, on such demand, has refused to do the same until it should be convenient for him to do so. The bill alleges that he had a large amount in his hands as such trustee, belonging to complainant therein, and that during all the time he was using it in buying and selling real estate, and from such use realized large gains and profits, and the prayer of the bill asks for compound interest. We think the matters set out in the bill sufficient to support the allowance.

The second objection relates to his allowance for services. It is a sufficient answer to that objection, that he should have set up the claim by answer, or presented it before the master, and the question can not be raised for the first time in this court, without exception to the master's report.

The third objection relates to what is called the Anderson & Brown purchase. It is unnecessary to extend this opinion by setting out the evidence bearing upon that item. It is peculiarly one of the cases where an objection should have been made before the master, and exceptions filed in the court below.

The remaining question arises upon the refusal of the court below to set aside the final decree rendered at the April term, upon a motion made at the May term of the court.

It has been held, under practice similar to ours, that a decree is to be considered as enrolled when it is signed by the chancellor and filed by the clerk, and the term has elapsed during which it was made. *Burch v. Scott*, 1 Gill & Johns.



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393; *Dexter v. Arnold*, 5 Mason, 303, 310; *Whiting v. Bank of United States*, 13 Peters R. 6, 13.

By the former English practice, the decree did not, strictly speaking, become a record of the court until it had been enrolled. "In fact, till a decree has been enrolled, and thereby become a record, it is liable to be altered by the court itself upon a rehearing; whilst a decree which has been enrolled, is not susceptible of alteration except in a court of appeal, or by bill of review." 2 Dan. Ch. Pr. 1221, 1232. The enrollment of decrees in England is now little known in practice. Coop. Eq. Pl. 91. The English practice of enrollment has never obtained here, but when a decree is ordered to be entered by the court, is duly filed for record by the clerk, and the term at which it was so entered has elapsed, it becomes a matter of record, surrounded with all the sanctity of an enrolled decree, and can not be altered or amended at a subsequent term, upon motion, except for the correction of mere clerical errors, or of form, or in respect to matters quite of course. *Lilly et al. v. Shaw et al. ante*, p. 72.

No error being apparent in the record, the decree of the court below must be affirmed.

*Decree affirmed.*

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MARY ELLEN WHITE *et al.*

v.

JOSEPH O. GLOVER.

1. ~~WILL—trustee—trust—property—sale of, in lieu of dower.~~ Where a testator, by his will, devises all his property to a trustee, to pay debts, to set off to his wife her share of the estate under the laws of the State, and to hold the remainder in trust for his children, and with power to sell and convey the same and invest the proceeds for the support of his children, and to convey the same, or the proceeds thereof, to them when they

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Syllabus. Statement of the case.

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should become twenty-one years of age: *Held*, that the will conferred ample power to sell and convey real estate, and a conveyance of a portion to the widow in lieu of her dower and all claim on the estate, and it will be presumed, in the absence of fraud, to be for the best interest of the estate, and was within the power conferred by the will.

2. **DECREE.** A decree of a court of equity licensing such a conveyance, although made without having jurisdiction, would not affect or abridge the power conferred by the will. And it is doubted whether a court of equity can convert a life estate into a fee, but the want of such power did not affect the deed executed under the will.

3. **EQUITY—infants.** The rights of infants will always be guarded by a court of equity, and whenever invaded or endangered, a remedy will be applied.

4. **TRUSTEE—sale of trust property.** A trustee may either sell the trust property at auction or private sale, unless the manner of doing so shall be prescribed in the instrument conferring the power.

5. **SAME—interest of trustee.** In this case the trustee was invested with a power coupled with an interest, as he was authorized to sell the lands and to hold and possess them for the purpose of the trust.

**APPEAL** from the Circuit Court of LaSalle county ; the Hon. EDWIN S. LELAND, Judge, presiding.

This was a suit in equity, brought by Mary Ellen White, Matthew White, Henry C. Monroe and Charles Monroe, in the circuit court of LaSalle county, against Joseph O. Glover and a number of other persons, for the purpose of reviewing, reversing and setting aside a decree of that court rendered at the June term, 1866, on a bill filed by the complainant in this case, so far as it authorized the conveyance of eighty acres of land to Adeline Head in lieu of her dower and interest in the estate of her deceased husband, James Monroe, and to set aside and cancel the deed.

The bill sets out the will, and alleges that Glover made the conveyance to Mrs. Head, who had, subsequent to the death of her husband, intermarried with Samuel D. Head.

The defendants filed a demurrer to the bill, which the court sustained and dismissed the bill, from which an appeal is prosecuted to this court.

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Mr. FRANK J. CRAWFORD, and Messrs. STIPP, BOWEN & SHEPHERD, for the appellants.

Mr. J. B. RICE, and Mr. B. C. COOK, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

Appellants filed their bill in the circuit court to review and set aside a decree, and for other relief.

The facts are, that the ancestor of appellants, in the year 1853, made his will and devised all his estate to Joseph O. Glover, in trust, first, to pay his debts; second, to set off and pay to his wife such share of the estate as she was entitled to by the laws of the State; third, to hold the remainder in trust for his children; and the trustee and executor was empowered to control and manage the estate; to sell and convey all real and personal property; to execute conveyances therefor; to invest the proceeds for the benefit of the children, as the trustee should deem best; to use such portion as was necessary for their support and education; and generally to use the same for the best interests of the children during minority; and in trust further, that the trustee should convey the property, or the proceeds thereof, to the children, when they should attain the age of twenty-one years.

The property devised consisted of two hundred and forty acres of land, four town lots, one of which was improved, and about \$7000 worth of personal property.

Monroe died in 1856, and the will was duly proven, and letters granted to Glover, who accepted the trust, and collected over \$7000, which he paid out for the benefit of the estate. So far as we can ascertain from the account filed by the trustee, only a small portion of this amount was paid towards the debts of the testator. Some real estate was purchased by the trustee to secure a debt, and over \$500 was paid out of the trust fund, to secure the title.

In 1866, one of the children arrived at the age of twenty-one years, and exhibited her bill against the widow, minor children and Glover, praying for the assignment to her of her

part of the estate, and the allotment of dower to the widow; and that in lieu of dower, eighty acres of land be conveyed to her in fee.

Glover consented to the relief prayed for, but invoked the aid of the court in the premises.

The court rendered a decree in accordance with the prayer, and Glover executed a deed to the widow, in which he recites that he conveyed the property, as executor and by virtue of the power in the will contained, and in obedience to the decree.

The title to this eighty acres has passed to other parties, and the object of the present bill is a reversal of the decree and cancellation of the deed made by the executor. If the executor had power to convey, and the conveyance in question was a proper exercise of the power, then the deed is valid, notwithstanding the decree.

The invocation of the advice and aid of the court would not invalidate the subsequent rightful action on the part of the executor, even if the court had no jurisdiction. It was a prudent course to pursue, and a trustee should never be the subject of criticism on account of his application to the chancellor for advice in the discharge of his delicate duties.

As we shall look only to the will to determine the validity of the deed, we shall not advert to the other questions presented in the argument of counsel.

If the trustee has been unfaithful; if there has been collusion between him and others to deprive the infants of their property,—of which it may be proper to remark there is no proof in this record,—they have ample remedy. They may make application for his removal, and may compel him to account for the manner in which he has discharged the trust.

Was the execution of the deed in pursuance of the power granted?

It is assumed that the deed shows upon its face that it was executed solely in obedience to the decree of the court. We can not so read it.

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It is true, that the deed makes reference to the decree, but it recites expressly that it was made "by virtue of the power in said will contained." Leave out all allusion to the decree, contained in the deed, and it is a complete execution of the power in the will.

It is matter of grave doubt, whether a court can, under any circumstances, convert a life estate into a fee. The will, however, gave ample power to sell and convey. We must, therefore, view the act of the trustee as the result of an unquestioned, and not a doubtful, power.

The position is correct, that, in determining the character of the power granted, we must ascertain the intention of the testator, but this must be collected from the whole will.

The direction in the will that the wife should have her legal share of the property, affords no aid in determining the nature and extent of the power given to the executor to sell and convey.

The testator evidently intended that his widow should take her dower under the statute, but this was no limitation of the power to sell, either to her or to any other person.

A conveyance to her, in satisfaction of dower, without fraud on the part of the trustee and without injury to his *cestui que trust*, ought not to be set aside for that reason only.

In this case no fraud is charged in the bill, and it does not appear that the infants have been injured, or improperly deprived of their estate. Their rights will always be guarded by a court of chancery, and whenever they are invaded or endangered, a remedy will be applied.

But the widow was entitled, under the law, to one-third of the real estate for life, and to certain specific articles of property, without any regard to the payment of the debts, and to one-third of the personalty, after the payment of the debts. The amount of the indebtedness of the testator was not large; the children were young; and we infer that the widow had a reasonably long lease of life.

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In view of these facts, and of the quantity of property belonging to the estate—of all of which the trustee had full knowledge—we can not conclude that the rights of the infants were prejudiced, or that they were unjustly bereaved of their property. On the contrary, it is fair to presume that the arrangement was the best for their interests, and made the remainder of the estate more valuable.

The deed was made in full satisfaction of all right of dower, and of all claims against the estate or the infants.

The argument that there was no sale, has no force. In the absence of express directions, the trustee may sell, either by public auction or by private contract, as may be most advantageous to the trust estate. He may convey in satisfaction of a debt, or sell for cash and pay the debt. If the conveyance in this case, as may be fairly assumed, was for a valid and legal consideration, and the estate was thereby protected and benefited, then the effect is the same as in a formal sale.

The language of the will in this case is entirely different from the language in the cases cited, of *Waldron v. McComb*, 1 Hill, 111, *Bloome v. Waldron*, 3 Hill, 361, and *McComb v. Waldron*, 7 Hill, 335.

They were all with reference to the construction of the same will. The words were, "To sell and convey \* \* my real estate—the moneys from all such sales to be vested and secured in such manner as Aaron Burr shall direct."

The court decided that the power was a naked one, and that, substantially, the direction was to sell for cash or its equivalent—something which may be invested.

In the case at bar, the power is coupled with an interest. The trustee has not only the legal title—the power to sell and convey, execute deeds and invest the proceeds—but to control and manage the estate, and use it for the support and education of the children, as the trustee should deem best.

The fee was not only vested in the trustee, but he was specially directed to apply and appropriate the proceeds of the land, in a different manner from that made by law.

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In *Bergen v. Bennet*, 1 Caines Cas. Err. 15, Chancellor KENT said: "If a man devises his land to his executors to be sold, then there is a power coupled with an interest, for the executors take possession of the land and of the profits."

Where the property is devised to one person in trust for another, and the testator has imposed upon the trustee certain duties, the performance of which requires that the estate should be vested in him, then the legal ownership passes to the devisee.

In this case the executor took the legal estate, so that he might control and manage it, sell and convey and apply the proceeds, command the possession and income, and maintain and educate the children. He has a large discretion, and without it the will can not be carried into effect. Having accepted the trust and taken the fee, the executor had full power to sell, and his deed is valid. *Clinefelter v. Ayres*, 16 Ill. 329; 2 Jar. Wills, 199 et seq; *Gregory v. Henderson*, 4 Taunt. 772; *Oates v. Cooke*, 3 Burr. 1684.

The distinction taken by counsel, between a power mandatory and discretionary, has been discarded by this court, as well as by the current of authorities. *Wardwell v. McDowell*, 31 Ill. 364.

The decree of the court below is affirmed.

*Decree affirmed.*

## Syllabus.

DAVID T. MOORE

v.

SAMUEL B. CHANDLER *et al.*\*

1. **MORTGAGES**—*sale of a part of mortgaged premises by administrator of mortgagor—such part only secondarily liable.* Where the administrator of a deceased mortgagor obtains an order of the probate court for the sale of a portion of the mortgaged premises, to pay debts other than that secured by the mortgage, which have been allowed against the estate, the residue of the mortgaged premises remaining to the heirs of the mortgagor must be first resorted to for the satisfaction of the mortgage, that portion held by the purchaser at the administrator's sale being only secondarily liable.

2. In that regard, the purchaser at the administrator's sale, and the heirs of the mortgagor, hold the same relation to each other that would have existed between the mortgagor himself and his grantee, in case the former had sold and conveyed a part of the mortgaged premises in his life time, and their respective rights are governed by the case of *Iglehart v. Crane & Wesson*, 42 Ill. 261.

3. And where the interest of a portion of the heirs had been sold under execution against them, prior to the sale by the administrator, the purchaser at the execution sale would stand in no better position than the heirs themselves whose interests had thus been sold.

4. **SAME**—*of applying the residue of the proceeds of the administrator's sale in satisfaction of the mortgage.* There remained in the hands of the administrator of the mortgagor a surplus fund, arising principally from the sale of the portion of the mortgaged premises. This could not, however, be applied to relieve the land purchased at the administrator's sale from its ultimate liability to the mortgage, the debt secured thereby never having been allowed against the estate, and the time having passed when it could be so allowed. The general property of the estate being thus discharged from the payment of the mortgage debt, it could only be enforced against the mortgaged premises.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. W. H. MOORE, for the appellant.

Mr. P. E. HOSMER and Mr. J. MILLER, for the appellees.

\*This case, and the next following, were submitted at the June term, 1871, but did not come to the hands of the Reporter in time to be placed with the other cases of that term, in the former part of this volume.



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Mr. JUSTICE SCOTT delivered the opinion of the Court :

The original bill in this cause was filed by Samuel B. Chandler, trustee for Adele S. Morrison, to foreclose a mortgage executed by Henry Darter and wife. The mortgage is in the usual form, and was made in 1864 to secure certain notes that would mature in five and six years after that date.

In March, 1867, Darter died, and in May following, Daniel Hay was appointed administrator of the estate. It was found that the personal effects were insufficient to pay the claims allowed against the estate, and, accordingly, in 1869, the administrator filed a petition in the county court and obtained a decree to sell so much of the real estate of which Darter died seized as might be necessary to pay the debts of the estate. In pursuance of that decree, the administrator sold forty acres of the land included in the mortgage, to the appellant, and executed to him a deed in the usual form.

Previous to this sale, the interest of two of the heirs, viz: Andrew M. and Anthony W. Darter, in the lands included in the mortgage, had been sold on execution, and that of Andrew was purchased by Geiss & Brosius, and that of Anthony by the administrator, Hay. They had received a sheriff's deed for the same, which was on file in the proper office, for record, Hay placing his on file the day and hour of the sale to the appellant. The other heirs and the several purchasers were made parties to the original bill. The appellant, Moore, filed a cross bill with a view to obtain a decree to compel the administrator, Hay, to pay the Chandler mortgage out of funds which, he alleges, were in his hands belonging to the estate, arising from the personal property and real estate sold to him ; and if this could not be done, to have the other lands embraced in the mortgage first exposed to sale to pay the mortgage indebtedness. The other defendants to the original bill also filed a cross bill, making Chandler and Moore defendants, in which they allege the forty acres purchased by the appellant was of equal value with another tract

## Opinion of the Court.

of forty acres, and of twice the value of the remaining tract described in the mortgage, and praying that each tract be subjected to the payment of a ratable proportion of the mortgage. There is no dispute as to the amount due Chandler, but the controversy is between the heirs and those claiming under them, and the appellant, in regard to their respective interests in the premises.

After payment in full of all claims allowed against the estate, there still remained in the hands of the administrator a surplus fund, arising principally from the sale of the land to appellant, which he insists should be applied to the payment of the mortgage. It is not perceived how this can be done. The Chandler debt was never allowed as a claim against the estate, and two years from the granting of letters having elapsed, it is now too late. The estate is, therefore, discharged from the payment of the debt, and Chandler can only enforce his claim against the mortgaged premises. There is no pretense he was within any saving clause of the statute. *People v. White*, 11 Ill. 342; *Wingate v. Pool*, 25 Ill. 118.

There is some conflict in the testimony, but the weight of the evidence is, the appellant paid the full value of the land purchased by him at the administrator's sale, and the principal questions in the case are, whether the other lands embraced in the mortgage, and which would descend to the heirs and those claiming through them, shall be first subjected to the payment of the mortgage, or whether the appellant's land shall be ratably charged with its payment.

The circuit court decreed, on the cross bill of the heirs, that the several tracts of land owned by the respective parties should each bear its proportional share of the burden of this mortgage debt.

This, we think, was error. The case falls within the rule announced in *Iglehart v. Crane & Wesson*, 42 Ill. 261, and the principles of that case must be held to control this.

The authorities all hold, where a mortgagor conveys a portion of the mortgaged premises, retaining a portion to himself,

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as between him and his grantee, that part retained by the mortgagor should be first applied to the payment of the indebtedness secured by the mortgage.

The principle is, that the property of the debtor must be first exhausted. It is regarded as only another mode of applying the principle, where there are two creditors standing in equal equity, one of whom has security upon two funds, and the other upon only one of the two, the former is required to proceed primarily against the fund upon which the other has no lien.

In Iglehart's case, *supra*, upon a very full review of the authorities, it was held to be a just and equitable rule, where a mortgagor makes successive sales of distinct parcels of the mortgaged property to different persons having notice of prior sales, and the mortgagee files a bill to foreclose, the several parcels shall be subjected to sale in the inverse order of their alienation. The rule established rests upon principle, and is supported by the weight of authority.

The court cites with approbation the case of *Clowes v. Dickerson*, 5 John's Chy. 235, in which it was held, a judgment creditor can not enforce his judgment against the lands of a subsequent purchaser, so long as there is other land of the debtor remaining to satisfy the judgment, and that heirs who pay off the judgment debt of their ancestor, are not entitled to demand contribution of the purchaser of his land subject to the judgment. It is for the reason, as expressed in the terse language of the old books, "the heir sits in the seat of his ancestor." The heir is bound to discharge the debt of the ancestor to the extent of the assets that may descend to him.

In the case at bar, the heirs can claim no other protection than the mortgagor, if living. As between him and his grantee, the portion retained would, undoubtedly, be liable to be first sold in payment of the mortgage. The purchasers of the interest of the two heirs, Andrew and Anthony, at sheriff's sale, can occupy no better position than the heirs themselves. They may be said to sit in the seats of the heirs. It is true,

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in this instance, the mortgagor did not himself convey any part of the mortgaged premises. That can not change the principle. A part of the lands covered by the mortgage was sold by decree of court by the representative of the mortgagor, and the proceeds applied to the benefit of the estate.

The effect is the same as if the mortgagor, in his life time, had conveyed the land, and that which remains to the heirs must be first subjected to the payment of the mortgage. The right of the appellant to equitable relief, would be the same in either case. In view of the fact, before stated, that the appellant paid the full value of the land, we deem it eminently proper, in this instance, that the relief sought should be granted.

The decree of the circuit court must be reversed, with direction to decree on the original bill as in its former decree, and upon the cross bill of the appellant decree that the lands which would descend to the heirs, shall be first sold to pay the mortgage indebtedness.

The court will also enter an order, dismissing the cross bill of the heirs and the other purchasers. No part of the costs of this court will be taxed against Chandler. The decree was procured in the interest of the other appellees, and the costs on this appeal will be adjudged against them.

The decree is reversed and the cause remanded.

*Decree reversed.*

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HENRY BAEHR

v.

CHRISTIAN WOLF *et al.*

1. TRUSTEE—*whether liable for neglect.* Where the owner of personal property placed the same in the hands of a third person, under an agreement that the latter should sell the property, and with the proceeds pay

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| 59   | 470  |
| 151  | 661  |
| 59   | 470  |
| 49a  | 664  |
| 59   | 470  |
| 180  | 642  |
| 59   | 470  |
| 114a | *257 |

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the debts of the former, and while the property was so held it was seized under an attachment against the owner, and subsequently sold under a judgment in that proceeding, it was *held*, the person who was thus prevented by legal process, over which he had no control, from performing his agreement, could not be charged with the value of the property, or the loss occasioned by the forced sale.

2. *CONTRACTS against public policy—whether equity will interpose as between the parties.* Should a party, indicted for an alleged crime, convey his property to another as security for becoming his bail, and for the purpose of assisting the former to flee from justice, and the parties equally participate in the unlawful transaction, a court of equity would not interfere to restore the property to the grantor, as against a wrongful claim of the grantee that he was the absolute owner. Such a transaction tending to impede or prevent the course of justice, is against public policy, and neither of the parties to it, if *in pari delicto*, could invoke the aid of a court of equity in respect to it.

3. But if the parties to such a transaction do not stand *in pari delicto*,—as, if the grantee obtained the conveyance under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that the guilt of the grantor was far less in degree than that of his associate in the offense, the grantee, a court of equity may, in a proper case, interpose to compel the grantee to relinquish his unjust claim to the property.

4. So in this case, a party having been indicted, and discharged upon bail, the surety on his recognizance, who was his brother-in-law, and the wife of the latter, who was a sister of the accused, advised him to convey his property to such surety and leave the country. The accused, although alleging his innocence, yet being apprehensive of danger, followed the advice, made the conveyance, and fled. On his return afterwards, and seeking to recover his property on the ground the conveyance was intended only as a mortgage to indemnify his bail against loss, a court of equity, regarding the advice given to the accused as for the purpose of getting his property by taking advantage of his fears, through an undue influence, and the parties therefore not *in pari delicto*, granted the relief sought.

5. *SUBSEQUENT PURCHASER—estoppel.* Where a person who holds a contract of purchase of land, stands by and sees another purchase the same land from his vendor, paying his own money therefor, and fails to make known any claim in respect to the land, he will be estopped from afterward claiming that the second purchaser bought for his benefit.

APPEAL from the Circuit Court of St. Clair county ; the Hon. JOSEPH GILLESPIE, Judge, presiding.

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Opinion of the Court.

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Messrs. G. & G. A. KÖERNER, for the appellant.

Mr. WM. H. UNDERWOOD, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

At the March term, 1860, of the St. Clair circuit court, three indictments were presented against the appellee Wolf, for complicity in an assault upon, and in the murder of, Andrew Koenig, and at the same term of the court Wolf entered into three separate recognizances in the sum of \$300 each, with the appellant, Baehr, as his surety, for his appearance at the next term of the circuit court, to answer unto the indictments.

It is alleged in the bill that in July following, Wolf, for the purpose of indemnifying and saving harmless the appellant as his surety, conveyed to him a certain tract of land which he had purchased of one Price, and also delivered to him a bond for a deed to another tract of land which he held from Carpenter. Previous to these transfers, Wolf had been in the occupancy of these lands, and had made some improvements on the forty acres purchased of Carpenter.

It is further alleged that, at the same time, Wolf transferred to the appellant a large amount of personal property, and some growing crops upon the lands transferred and on certain leased lands, for the purpose of having the same applied to the payment of certain debts owing by the appellee Wolf. Soon after making the transfers of the real and personal property, Wolf fled from the country, and it does not appear that he ever returned until the year 1862 or 1863.

It appears that other parties were indicted at the same term of the court for the same crime, two of whom were sent to the penitentiary. Wolf forfeited his recognizance, and judgment was subsequently rendered against appellant, Baehr, for \$600, no part of which was ever paid by any one. For some reason, the prosecution against Wolf was dismissed.

The object of the bill is to compel a reconveyance of these lands, and for an account of the rents and profits, and also an account of the personal property.

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It satisfactorily appears from the master's report, which is fully sustained by the evidence in the record, that all the personal property was taken out of the possession of Baehr for the payment of the debts of Wolf. It was attached and sold by the officers of the law. It is insisted that Baehr agreed to sell the property at public sale and apply the proceeds to the payment of Wolf's debts, and it is sought to charge him with neglect in that regard. If such was the agreement, Baehr was prevented from performing the contract without any fault on his part. Immediately upon the flight of Wolf, the property was seized by his creditors under legal process, and it would be inequitable to charge Baehr with the value of the property or for any sacrifice that was caused by the forced sales. It was not in his power to prevent the sales or the sacrifices on the property.

The grave questions in the case arise on the relief sought as to the two tracts of land.

The grounds upon which the appellee Wolf predicates his right to relief are, that the appellant is a mortgagee in possession ; that the deed of the 2d of July, 1860, for what is known as the Price land, was not intended to be an absolute deed, but only as a security to save the appellant harmless as surety on the several recognizances, and that the Carpenter bond was transferred and delivered for a like purpose. On the other hand, the appellant insists that he took the property described in the deed, absolutely, and subject to no defeasance whatever, and that he acquired the other tract of land from Carpenter by a subsequent purchase, as he lawfully might.

The evidence is of such a character that it leaves no doubt on the mind that the deed for the Price land was not intended by the parties to be an absolute deed, and that the land was to be reconveyed in case the appellant did not have to pay the recognizances. Such, we think, is the only fair construction that can be given to the evidence.

It is insisted, however, that the contract was made with a view to assist Wolf to flee from justice, and hence that it was

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against public policy and therefore void. Doubtless, if it was made with that view, and both parties equally participated in the unlawful transaction, it would be against a sound public policy and a court of equity would not interfere to relieve either party from the consequences that might flow from such an unlawful act. The law would leave the parties in the situation where they placed themselves, and to the consequences of their own corrupt conduct.

It is said that any contract that can impede or prevent the course of justice, is void. Chitty on Contracts, 674. It should, however, always distinctly appear that the parties are *in pari delicto*. Mr. Story, in his work on Equity Jurisprudence, says: "In cases where both parties are *in delicto* concerning an illegal act, it does not always follow that they stand *in pari delicto*, for there may be, and often are, different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense." 1 Story Eq. Jur. sec. 300.

The doctrine of the text rests on principles of sound reasoning and authority. *Osborne v. Williams*, 18 Ves. 378; *Pinkston v. Brown*, 3 Jones Eq. R. 494; *Phalon v. Clark*, 19 Conn. 420.

One party may not make use of his peculiar power over another to procure a contract which, in itself, is illegal, and contrary to public policy, and then invoke the aid of the law to enable him to retain that which he has obtained through fraudulent practices and artifices. It would contravene the settled law that the courts will protect the citizen against all such acts of oppression and deceit.

In the case under consideration, the conveyance was not made at the time the recognizances were entered into. At that date there is nothing in all the record that would indicate that Wolf had the slightest intention to flee from justice. It was not deemed necessary, in the first instance, to give any indemnity to the appellant as the bail of Wolf. It was a



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subsequent suggestion. The evidence tends most strongly to establish the conclusion that the appellant and his wife operated on the fears of Wolf, and induced him to believe that if he did not flee from the country his bail would be raised and he would be placed in jail, and perhaps ultimately sent to the penitentiary. The evidence will reasonably bear such a construction; indeed, it can not be explained consistently with any other hypothesis. The wife of the appellant, who is a sister of Wolf, seems to have been the most active in producing this impression on the mind of her brother. It can not be denied, that just previous to the making of the deed and the delivery of the personal property, the appellant and his wife both persistently urged upon Wolf the necessity of going away until after the Fritz trial should be over, and the necessity of conveying the property to the appellant, which was done. The fears of Wolf were so operated upon, that he finally "took their advice." We must regard the evidence that establishes the fact of the undue influence of the appellant and his wife over Wolf, as the better evidence in the case. The facts and circumstances, about which there can be no dispute, added to the direct testimony, are sufficient to overcome the express denial of the appellant as to the use of improper influences to induce Wolf to depart from the country. No motive can be assigned for the conduct of the appellant, except it was to get control of the property, and ultimately the absolute ownership if Wolf did not return. The appellant at once entered into possession of the property and commenced to use it as his own, and his whole subsequent conduct strengthens this hypothesis.

It is said, that if Wolf was innocent of the crime with which he was charged, as he now alleges, he ought not to have taken the advice of the appellant and that of his sister, but ought to have remained and asserted his innocence before the court. Some allowance must always be made for the imperfection of the human judgment under certain circumstances. The conduct of persons accused of crime, although

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they may be entirely innocent, is often most inexplicable. Such persons often magnify, many-fold, the dangers that surround them. Under such circumstances their fears are easily wrought upon, and the law will not always require of them the exercise of that clear and accurate judgment that would otherwise be expected.

Under the facts in this case, we can not regard the parties as standing *in pari delicto*. The moral turpitude attaching to the conduct of the appellant in the illegal transaction, is much greater than that of the appellee Wolf. In view of the relations existing between the parties, Wolf had the right to expect, from the appellant and his wife, the most candid and disinterested advice. It does not appear, from anything in the record, that the advice given was justified by the facts in the case. The appellant has not even stated the causes that induced him to give the advice that he evidently did. The record is singularly barren of everything that justifies, or that even tends to justify, the conduct of the appellant in the premises. We are, therefore, of opinion that Baehr held the land as indemnity against loss as security on the several recognizances, and that the appellee Wolf, is entitled to the relief sought by the bill, as to the land purchased of Price.

The facts in relation to the other tract of land, designated as the Carpenter land, are very different. Wolf purchased the land from Carpenter in 1859, and received a bond for a deed. He made no payments whatever, on it; the first payment became due in 1860; this payment was never made by Wolf, or by any one for him; the bond was not assigned to appellant. The utmost the appellee insists upon in regard to this bond is, that he delivered it to the appellant, and that it was to be returned to him in case the appellant did not have to pay the recognizances. The appellant denies that he ever even had the bond in his possession.

Wolf returned in 1862, certainly in 1863, and it does not appear that he ever made any effort to pay Carpenter for the land, or to get an extension of the time of payment. Nothing

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was ever paid on the Wolf contract, and Carpenter, under the circumstances, had the clear right to declare the contract forfeited, and sell to whomsoever would buy. It was not until February, 1864, that the appellant purchased the land of Carpenter for his own use, at an advance of some \$700 above the price that Wolf was to pay for it. Wolf had then been at home for certainly nearly a year, in the vicinity of where all the parties resided. The criminal prosecution had then been dismissed, and there is not the slightest authority in the evidence for saying that the appellant was then acting as the agent, trustee, or in any other capacity, for Wolf.

The appellant was not then, and never was, the trustee of Wolf, for this particular land. He never received from him even the shadow of an equitable title to it. It does not appear that Baehr made any use whatever of the bond, or availed of his relations with Wolf to effect the purchase from Carpenter. So far as the evidence discloses, Wolf had abandoned his contract, and Carpenter could lawfully sell the land to appellant or any one else. Wolf stood by and saw the appellant making the contract with Carpenter in his own name and for his own use, and paying out his own money therefor, and he can not now be heard to say that the appellant was purchasing it as his trustee, and after the lapse of years come into a court of equity and say that he will take unto himself the profits of the transaction. When Wolf saw the appellant purchasing the land of Carpenter with his own money, and to his own use, he ought then to have asserted his rights if he had any ; but having remained silent for so many years, he will now be estopped to deny that the purchase was rightfully made by the appellant to his own use. There is nothing in the record to show that, at the time the appellant made the purchase from Carpenter, he occupied any fiduciary relation whatever towards Wolf.

Wolf had abandoned his contract with Carpenter, and the appellant had as clear right as any one to come in and make the purchase, and it would be a perversion of all the principles

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of equity to allow him now to come in and say that the appellant, although he used his own funds in making the purchase, was still his trustee, buying for him, and that he will have an account of the rents and profits, and that he will have the land sold, and out of the proceeds pay back to the appellant his advances, with simple interest, and retain the surplus to his own use. There is not the shadow of an equity in the claim asserted by Wolf to the Carpenter land, and the circuit court ought to have dismissed the bill as to it.

On another hearing, the circuit court will again refer the cause to the master, to take and state the account as in its former interlocutory order, leaving out of the account the Carpenter land, and anything the appellant may have paid for improvements on that land, made by Wolf under his contract with Carpenter. If anything shall be found due to Wolf from the appellant, the court will direct it to be paid on the Kissel debt, and not to him, and may then order the interest of all the parties in the Price land to be sold to pay the Kissel debt and the judgments on the recognizances. The court will, however, decree that Wolf shall be allowed ninety days in which to pay the Kissel debt and the amount due on the judgments on the recognizances, before directing the sale of the land.

The appellee has assigned cross errors on the exceptions to the master's report, but we do not deem it necessary to comment on all of them. The account was correctly taken according to the order of the court, which was on the correct principle.

It is insisted that the appellee was not allowed enough for the rent of the premises. It is a sufficient answer to this objection to say, that he was allowed quite as liberally as the proof would warrant, and he ought to be well satisfied with the report in that regard.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

*Decree reversed.*

## WILLIAM THOMAS

v.

THE COUNTY OF MORGAN *et al.*\*

1. *SUBSCRIPTION to stock of a railroad company by a county—application of bonds issued therefor.* Where the bonds of a county, issued upon a subscription of the county to the stock of a railroad company, were delivered to the bankers of the company, upon the stipulation between the county authorities and the company, that they were to be applied in payment for work done upon the road within the county and not elsewhere, it was *held*, the sense of the stipulation, in view of its purpose, was, not that those identical bonds should pay for work done in that county, but it was, if work was done in the county, the bonds should be delivered to the company.

2. *SAME—by whom the condition may be performed.* Nor is it essential, in such case, in order to create the obligation of the county to deliver the bonds, that the work should be done by the company to the stock of which the subscription was originally made, and with which the stipulation was entered into, but if the work was done by the successors of that company, endowed with all the rights, privileges and franchises of the latter, that would be a substantial performance of the condition upon which the bonds were to be delivered.

3. *SAME—rights of creditors of the original company, and of their assignees, in respect to such bonds.* And where the original company had incurred a debt on account of work done upon the road, and in payment thereof gave to their creditor an order upon the custodian of the bonds for a sufficient amount of them to satisfy the same, which order was sold and assigned to a third person, but, by reason of there having been no work done upon the road within the county, there was no obligation to deliver any bonds upon such order, it was *held*, that if work was subsequently done within the county by the successors of such original company, so as to comply with the condition upon which the bonds were to be delivered, then the order issued by the original company would operate as an equitable transfer to the holder thereof, of so much of the county subscription, represented by the bonds, as was embraced in the order.

4. *CHANCERY—remedy of such assignee—and herein, of a creditor's bill.* In such case, where the custodian of the bonds, under the direction of the county authorities, refused to deliver the bonds called for by the order of the railroad company, the holder of the order has his remedy in chancery to compel their delivery to him, without first proceeding at law against the

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\* This cause was decided as of the January term, 1871, but did not come to the Reporter's hands in time to be placed in its order with the other cases of that term.

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company as for a debt due from them to him as the assignee of their order. A bill filed for such purpose would not be regarded as a creditor's bill, nor in the nature of one.

5. *SAME—where a fund is under the control of a court.* Moreover, where the bonds sought to be reached have been, by the action of a court of chancery, placed in the hands and custody of a trustee, there to remain until the further order of the court, a third person, not a party to the suit in which the order was made so placing the custody of the bonds, but entitled to them, can only reach them by original bill.

6. *PARTIES in chancery.* In a suit by such holder of the order given for the bonds by the original railroad company, to compel the delivery of them by the custodian, such original company, having ceased to exist and all its rights and franchises vested in its successor, is not a necessary party to the bill.

7. *FORMER ADJUDICATION—whether a bar.* Where a suit was instituted for the purpose of settling conflicting claims for the county bonds, to which the holder of the order of the railroad company was a party, and it was determined therein that he was not entitled to the bonds under the order because at that time the condition upon which the bonds were to be delivered to the company—the doing of work on the road within the county—had not been performed, it was *held*, the adjudication in that suit, adverse to the holder of the company's order, was not a bar to a subsequent suit by him to enforce his claim of the same character, on the basis that after that adjudication the company did do work upon the road within the county, and thereby performed the condition upon which the bonds were deliverable.

8. *CHANCERY—wasting of a trust fund.* Where a trust fund in the custody of the court is about to be wasted and misappropriated, it is the duty of the court to prevent it.

APPEAL from the Circuit Court of Morgan county.

Mr. WILLIAM THOMAS, *pro se.*

Mr. ISAAC L. MORRISON, for the county of Morgan.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The prominent facts of this case, as we gather them from the statement and brief of appellant, and not controverted by appellee, are substantially as follows:

A charter had been granted by the general assembly of this State, under which the Illinois River Railroad Company was

organized, and commenced the construction of their road. The county of Morgan subscribed \$50,000 in county bonds to the stock of this company, payable in instalments, as required by the board of directors of the railroad company. These bonds were printed, signed, and ready to be delivered. They bore date September 10, 1857, and were deposited for safe-keeping with Brown & Elliott, bankers, of Jacksonville.

The company contracted with the firm of Allen & McGrady to grub, grade and tie the road, and, for the work to be done in Morgan county, the company agreed to pay, and the contractors to receive, these bonds. The facts in relation to this contract were reported by the president of the company to the county court of Morgan county. Thereupon, the court ordered the delivery of the bonds, as the president understood, unconditionally, but, as the court contended, to be delivered in payment of work done in Morgan county. Acting upon his understanding of the arrangement, the president of the company, on the 2d of April, 1859, gave orders on the bankers, Brown & Elliott, in favor of Allen & McGrady, the contractors, for two bonds of \$2000 each, on account of work executed by them, or on account of a tie contract.

These orders were sold and endorsed by Allen & McGrady to William Thomas, the complainant and appellant, who, on presenting them to the bankers, was informed by them that the county judge had notified them not to deliver any bonds except in payment for work on the road in Morgan county. This was the first information appellant had that the county claimed there was any condition imposed upon the company in regard to the delivery or use of the bonds.

To obtain funds to purchase iron for the road, the company issued coupon bonds, and, to secure their payment, executed a deed of trust to parties in the city of New York, bearing date November 1, 1858, upon the road and its appurtenances. The road was completed from Pekin to Virginia, in the county of Cass; and the line surveyed from the last named point to

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Jacksonville, in Morgan county, but not finally located, in 1860.

In October and November, 1862, certain parties who had executed contracts for ties for the road, obtained judgments against the company in Mason and Peoria counties, upon which executions were issued and returned *nulla bona*.

While these actions were pending, but before judgments were obtained, the company failing to pay the interest on its bonds secured by this deed of trust, the trustees, in July, 1862, with the consent of the company, took possession of the road, placed their agent in charge, and commenced running and operating it for the use of these bondholders. Everything was surrendered by the company to the trustees except the bonds now in controversy.

The judgment creditors in Peoria and Mason counties commenced proceedings in garnishment against Brown & Elliott, who held the bonds, claiming the right to subject them to the payment of their judgments. The trustees under the deed of trust claiming that the bonds had passed to them under the deed, and this appellant claiming he was entitled to \$4000 of them, in kind, and the president of the company, R. S. Thomas, claiming the right to a sufficient number of them to pay an indebtedness to him which the company had formally acknowledged, and the county denying the rights of all these parties as claimed by them, Brown & Elliott, to relieve themselves of all responsibility, filed their bill of interpleader in the Morgan circuit court against all these parties, that their respective claims might be adjudicated, and to obtain a decree directing the manner in which these bonds should be appropriated. All the parties appeared and interpleaded, and it was the judgment of the circuit court that the railroad company had no right to these bonds, except to pay for work done on the road in Morgan county, and the fact being admitted that no work had been done in that county, except surveying one or more lines, dismissed all the bills of interpleader; from which decree



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the judgment creditors and R. S. Thomas, and the complainant, appealed to this court.

While this bill for interpleader was pending in the circuit court, these bonds were, by order of the circuit court, deposited with the banking house of M. P. Ayres & Co., there to remain subject to the further order of the court.

The directors of the company held no meeting after the road was surrendered to the trustees, nor did they perform any act, or claim to do any, as a corporation, thereafter.

On the 11th of June, 1863, the general assembly of this State passed an act to incorporate the Peoria, Pekin & Jacksonville railroad, providing, among other things, that the corporation thereby created should have, possess, and be vested with, and might use, enjoy and exercise any or all of the corporate powers, privileges, rights, munities and franchises theretofore given or granted to the Illinois River Railroad Company under or by virtue of any act or acts of the general assembly of this State.

This corporation, having possession of the road by the purchasers under the deed of trust, proceeded to and did complete the road from Virginia to Jacksonville.

This court, on the appeal of Thomas and others, 39 Ill. 496, held, on the facts then before it, that Thomas, the appellant in this suit, was not entitled to the bonds, they being issued on the condition that they should be paid out only for work on the road done in Morgan county, and that he took the orders with notice of this condition. As to the judgment creditors, it was held they could pursue the bonds, and remanded the cause, upon which, the circuit court decreed in favor of these creditors. Their claims amounted, in the aggregate, to \$7008.10, and by the decree, on the basis that the market value of the bonds was fifty cents on the hundred, appropriated \$17,520.20 of the bonds to satisfy the decree—the balance of the bonds to remain with M. P. Ayres & Co.

It is alleged in the bill that, at the time of this decree, these bonds were at par.

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The amount of bonds remaining with Ayres & Co. was sixty-five, each for \$500.

It is alleged in the bill that, in order to secure the passage of this act of June 11, 1863, and while suits were pending in the circuit court to subject these bonds to the claims of creditors then suing, two of the three trustees of the Illinois River Railroad Company, namely, Lucius Hopkins and Alexander Steedwell, entered into and signed this stipulation: "The undersigned, trustees in the first mortgage of the Illinois River Railroad Company, being desirous to obtain a charter for incorporating the purchasers of said railroad, do hereby stipulate that nothing in the act of incorporation which may be passed by the legislature, shall in any way affect the title or right of the trustees or bondholders, or any creditors of said road, or any person having claims or rights to the whole or any part of \$50,000 of Morgan county bonds, and now in litigation in the circuit court of Morgan county, but the right and title to said bonds shall be left to be decided in the suit now pending in the Morgan county circuit court."

This stipulation is dated June 5, 1863. The suit then pending, as we understand, was the case decided in 39 Ill. *supra*.

It is alleged in the bill that the board of directors of this company never met as a board for the transaction of business after the meeting in July, 1862, and by their action at that time all the property, franchises and rights of the company were transferred and assigned to trustees, and nothing remained either of power or authority on which the board could act; that by the subsequent act of June 11, 1863, incorporating the Peoria, Pekin & Jacksonville Railroad Company, all of the rights, powers and franchises of the Illinois River Railroad Company were vested in the company incorporated by that act; that by the action of the board in July, 1862, taken in connection with the action of the general assembly, the Illinois River Railroad Company was dissolved, and ceased to have any legal existence.

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The bill alleges that, after the decision of this court, in 39 Ill. 496, in 1866, the general creditors of the Illinois River Railroad Company commenced actions at law on their several claims, to which actions B. S. Prettyman, assuming to be the vice president of that company, entered his appearance, waived service of process, and either confessed or permitted judgments to be entered against the company, upon which executions were issued and returned "*nulla bona*." These parties, then, in September, 1867, filed their bill in chancery in the Morgan circuit court, making the Illinois River Railroad Company, the county of Morgan, and M. P. Ayres & Co., defendants, the object and scope of which bill was to subject these bonds to sale to pay their judgments. To this suit appellant was not made a party, nor did he have any notice of the proceeding, although, as is alleged in this bill, those complainants knew he was interested in the question of the disposition of these bonds, and it is alleged there was no allegation in their bill that the road had been constructed in Morgan county, or that their claims were for work done on the road in that county.

To this bill, it is alleged the same B. S. Prettyman appeared as the attorney of the railroad company, and consented to a decree, which was entered in November, 1867.

It is alleged these judgments amounted in all to about \$40,000, and that, by an agreement between the county and these creditors, the county paid to their attorney \$6000 in cash and \$6360 of the bonds, in full satisfaction; and it is alleged the record was so made up as to show that all the bonds on deposit with Ayres & Co. were used in making this payment, and that Ayres & Co. surrendered the bonds as required by the decree.

The decree is as follows: That the Morgan county bonds on deposit with M. P. Ayres & Co., to-wit, \$32,500 in nominal value, being sixty-five in number, from number 1 to number 7 inclusive, and from number 43 to number 100 inclusive, be applied, so far as is necessary, to the payment of the complainants' judgments, and interest, as follows:

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A list then follows of the names of the judgment creditors, and amounts due them respectively.

Ayres & Co. were required to deliver these bonds to the special master appointed by the court. The decree further provided that, unless the county of Morgan and the judgment creditors agree that these bonds be received in payment at an agreed price, the special master was directed to sell them, or so many of them as might be necessary, for cash, at public sale, at the door of the court house in Jacksonville, first giving notice of the time, terms and place of sale by publication in the "Daily Jacksonville Journal" three weeks in succession, and that he apply the proceeds to the payment of the costs of the suit and the sale, and then to the payment of the claims of complainants—the surplus, if any, to be reported to the court. And it was further provided by the decree, if the county should agree with the creditors to take the bonds at an agreed price without sale, then the special master was required to deliver so many of the bonds to the creditors which, at the agreed price, would pay the judgments, and report the surplus, if any, to the court, and the special master was required to report generally.

It is further alleged in the bill that, at a subsequent term of the court, the special master reported that, by the agreement between the county and the creditors, he had delivered the bonds to the solicitor of the creditors in full satisfaction of their judgments.

It is then alleged by complainant that, when he heard of these proceedings in April, 1868, and also that the Peoria, Pekin & Jacksonville Railroad Company was about to commence work on the road from Virginia to Jacksonville, and being also informed that the attorney for said creditors had not paid over to them the bonds and cash paid to him, filed this bill containing the above facts, and prayed an injunction against the county to enjoin them from paying to these creditors what they had agreed to pay, and also praying the court to set aside the proceedings on the ground of fraud, and to cause

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the county bonds to be returned to their former place of deposit.

To this bill the county, the judgment creditors, and all other persons known to have any interest in the fund, were made parties defendant.

In October, 1868, an amendment to the bill was filed, alleging that this company had commenced work on the road, and would probably complete the same to Jacksonville in a few months. And in August, 1869, by another amendment, it was alleged the road had been completed to Jacksonville.

To the bill, as amended, the county of Morgan appeared and put in a general demurrer, which was sustained, and the bill dismissed. No other parties appeared. The complainant appeals.

We have been thus particular in setting out the main facts of the case, as it is somewhat complicated.

Appellant insists that the decision of this court, in 39 Ill. *supra*, only settled the question as to the rights of the parties to that suit upon the facts then presented, but settles no question that might arise upon the expenditure of money in the construction of the railroad in Morgan county.

So far as this appellant is concerned, his right to any portion of these bonds was adjudicated adversely to him, on the ground, chiefly, that the contractors, from whom he received the order for these bonds, had done no work on this road in Morgan county, and that appellant, being a director of the company, had knowledge that these bonds would not be delivered except for work done in Morgan county. No question was made as to the *bona fides* of the transaction.

Appellant contends that, at the time this decision was made, in 1866, the Illinois River Railroad had ceased to exist, but if it had continued its existence, and constructed the road in Morgan county, he would have been entitled to the bonds.

This would seem to be a clear proposition. The liability of the county depending on the fact that work should be done in the county, when such work was done in the county the

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liability would be absolute; and appellant, as assignee of the contractors, for value, would have an equity which ought to be enforced.

He now insists, inasmuch as the road has been constructed in the county by the successors of the first company, such construction, for all the purposes for which the stock was subscribed, is equivalent to its construction by the original company, and the county as much bound to deliver the bonds to the successor as it would have been in the first instance.

It is undeniable, that the moving cause for the subscription, the real motive, was the construction of the road in Morgan county. It did not matter to the county by what particular agencies the road should be made—it was sufficient that it was made. The stipulation must be construed with reference to its object and substance. The object was to secure the road in Morgan county. Had the company built the road out of its general assets, it is very certain they could have demanded the bonds. The sense of the stipulation is, not that these identical bonds shall pay for work done in Morgan county, but it is, if work is done in the county, the bonds shall be delivered. The fact that the road has been completed from Virginia to Jacksonville, is a substantial performance of the condition on which the bonds were issued, and the Allen & McGrady order for \$4000 of them, drawn by the company, which has honestly come into the possession of appellant, operated as an equitable transfer of so much of the county subscription from the railroad company to appellant.

But it is insisted by appellees that appellant is not in position to demand the aid of a court of equity—if he has any remedy, it is complete at law. In this connection, they insist that appellant should first obtain a judgment at law against the Illinois River Railroad Company, issue an execution thereon, and have a return of *nulla bona*; that all this is indispensable, and without it a court of equity has no jurisdiction.

It is too well settled that, where the remedy is complete at law, equity will not interfere; and to be in a position to file a

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creditor's bill, it is indispensable legal measures must be first exhausted. But this is not a creditor's bill, nor in the nature of one. Appellant does not claim to be a creditor of that company, but to have an equitable right to a certain fund which was pledged to that company, to be paid on a certain event; that, by the act of that company, he is the equitable assignee of a portion of this fund. And the further theory of the bill is, that the fund in question, by the action of the circuit court of Morgan county, is in the hands and custody of a trustee, there to remain until the further order of the court. That a fund so situated can be reached by original bill, and only in that way, is a proposition too plain for argument.

That a judgment should first be obtained against the railroad company is not necessary, and if it was, there are facts alleged in the bill sufficient to show that no process could be served on the company, they being, so far back as 1862, to all intents and purposes, a defunct corporation, having no organization and doing no corporate acts from that date. And this is an answer to the objection that this defunct company should have been made a party to the bill.

Upon the theory that these bonds are a trust fund in the custody of the court, it is the duty of the court to see that it is not wasted or misapplied, as the demurrer admits it has been, in the respects alleged in the bill of complaint.

It is not denied that the parties prosecuting that suit agreed to receive from the county, in full satisfaction of their claims, the sum of \$6000 in cash and \$6360 of these bonds. There were then in the hands of the custodian, Ayres & Co., bonds of the nominal value of \$32,500. These were surrendered, by the custodian, to the solicitor of the complainants in that action, in discharge of an indebtedness of only \$12,360. This, without explanation, is a wasting and misappropriation of the fund, which a court of chancery can and ought to correct.

As to the validity of the decree, we will not now undertake to decide. Independent of this question, there is, apparently, a surplus in the hands of the solicitor of these creditors, after

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satisfying their claims, sufficient, if equitably administered, to discharge appellant's claim, if nothing shall hereafter be shown to the contrary, when the case goes to a hearing.

A portion of this fund seems to be in the hands of this solicitor, and it ought not to be wasted, but should be applied in part to the discharge of appellant's claim, if there be no superior claim; and the only way to effect this is by original bill. As appellant was not a party to the proceedings of 1867, in which the decree was made, he could not appeal from it. He has resorted to the only mode available to arrest a further misappropriation of the fund. These views are based, in some degree, upon the fact that the present organized railroad company assert no claim to any portion of this fund, but abide the stipulation set forth in the bill. And there is great propriety that this fund should be appropriated to the discharge of the liabilities of the defunct organization.

The remaining objection of appellee is, that the rights of appellant have already been adjudged in 39 Ill. *supra*, and can not be again litigated.

As we have said, the rights of appellant were passed upon in that case, as the facts then existed. Then no work had been done in Morgan county, and as that was a condition of the delivery of the bonds, it might be well claimed by the county that the condition had not been performed. The case is different now. The work having been completed in the county by the successors of the original company, appellant has an equitable right to have his debt against the company paid out of their assets.

The decree is reversed and the cause remanded, with leave to withdraw the demurrer and answer the bill.

*Decree reversed.*



JAMES LINDSAY

v.

SARAH STOUT.\*

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| 28a  | 35   |
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| 68a  | 432  |
| 59   | 491  |
| 108a | *608 |

1. PLEA IN ABATEMENT—*waiver*. A plea in bar filed in a cause, will operate as a waiver of a plea in abatement previously filed.

2. PLEA UNANSWERED—*trial without an issue*. Where a case stands merely upon a plea of confession and avoidance, which constitutes a good bar to the action, a verdict and judgment in favor of the plaintiff, resulting from a trial while such plea remains unanswered, will be erroneous, there being no issue to be tried.

WRIT OF ERROR to the Circuit Court of Edgar county.

Mr. R. N. BISHOP, and Mr. A. J. HUNTER, for the plaintiff in error.

Mr. JOHN W. BLACKBURN, for the defendant in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court :

In this case, which was assumpsit upon two promissory notes, the defendant below filed, first, a plea in abatement, averring that plaintiff was a married woman at the commencement of the suit, and her husband was still living. To this plea plaintiff first demurred, then obtained leave to withdraw the demurrer, and, replying, alleged that the notes sued on were her sole and separate property, etc. Rejoinder by defendant, traversing the matters alleged.

At a subsequent term the defendant, by leave, filed the general issue, and a special plea setting up that the notes were obtained by fraud. At the next term the defendant, by leave, withdrew the plea of the general issue. The record shows

\* This and the remaining cases contained in this volume were submitted at the January term, 1871, but by reason of the records being destroyed in the Chicago fire in that year, while in the office of Mr. Justice McAllister, the final disposition of them was necessarily delayed.

## Syllabus.

that, as the case then stood, there was a trial by a jury, and verdict for plaintiff for \$265.33, upon which judgment was rendered.

There is nothing in the record to show that the plea of fraud was answered by either demurrer or replication.

The defendant, by filing the general issue and special plea to the merits, waived the plea in abatement, and when the general issue was withdrawn, the case stood merely upon a plea of confession and avoidance; that plea remaining unanswered at the time of the so-called trial, there was no issue to be tried, and the unanswered plea constituting a good bar to the action, the judgment of the court below is erroneous, and must be reversed, and the cause remanded.

*Judgment reversed.*

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JOHN BAUGAN

v.

JOHN MANN.

1. DEDICATION—*by whom*. A primary condition of every valid dedication is that it shall be made by the owner of the fee.

2. EVIDENCE—*sufficiency, to show title*. In a suit to enjoin the defendant from erecting a building on a certain parcel of ground, on the allegation that the *locus in quo* had been dedicated as an alley by a former owner of the fee, from whom the complainant deduced title to a lot adjacent to such alley, it was not shown that the person who made the alleged dedication had title to the premises, nor did it appear that the defendant claimed title under him, so the complainant failed in his proof, it being essential to the validity of the dedication that the person making it was the owner of the fee.

APPEAL from the Circuit Court of Cass county.

Mr. G. POLLARD, for the appellant.

Messrs. SHAW & DALE, and Mr. H. E. DUMMER, for the appellee.

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Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was a bill for an injunction, exhibited by appellee against appellant, to restrain the latter from building upon a portion of block 10 in the city of Beardstown, the appellee claiming that such portion was an alley appurtenant to a sub lot of said block, of which he was the owner in possession.

The bill alleges that about the year 1848, one Charles Sprague, then being the owner of lots 9 and 10 in said block, caused the same to be divided into sub lots, thereby laying off the alleged alley; that he made a plat of the sub-division with the alley designated thereon, and sold and conveyed said sub lots with reference to this plat, and avers that Sprague thereby solemnly dedicated it to the use of the owners of the sub lots in particular, and, as complainant believed, to the use of the public generally; that for many years the alley had been used as such by the owners of the sub lots and the public generally, up to May, 1868, when appellant began an excavation therein for a cellar, and to erect a brick building thereon.

Appellee, by his bill, deduces his title from Sprague.

Appellant, by his answer, set up as an estoppel, and conclusive, the judgment of the Cass circuit court in a certain cause between the city of Beardstown and one George J. Schmidt, involving the legal existence of such alley. He also traversed the allegations of appellee's bill, and alleged title in fee to the *locus in quo* in himself. Replication was filed and the cause heard upon the pleadings and proofs. Decree for a perpetual injunction, and the case brought to this court by appeal.

In order to make out a case, it was necessary for appellee to prove title in Sprague at the time of making the alleged sub-division of lots 9 and 10 in block 10, or to show that the appellant claimed title under Sprague. It is expressly conceded by appellee's counsel that there was no evidence on either side as to the title of appellant.

The evidence fails to show title in Sprague. Unless he owned the fee, he could make no valid dedication to public use. A primary condition of every valid dedication is, that it shall be made by the owner of the fee. *Post v. Pearsall*, 20 Wend. 442; *Wood v. Veal*, 5 Barn. & Ald. 454; Angell on Highways, sec. 134.

The record failing to show either title in fee in Sprague, or that appellant claimed under him, the decree is unsupported by the evidence, and must be reversed and the cause remanded.

*Decree reversed.*

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THOMAS SNELL

v.

ROWENA WEIR.

**TROVER**—*whether the proof shows a cause of action.* In an action of trover for a horse, it did not appear that the defendant had ever exercised any control over the horse, or that any demand was made before suit brought. There was evidence tending to show a ratification by the plaintiff of a sale of the horse previously made by a bailee. It was *held*, the proof failed to establish a cause of action, and an instruction which directed the jury that if the bailee was not authorized to sell the horse, they should find for the plaintiff, being the only instruction given, was erroneous, because it excluded from the consideration of the jury the question whether there was a wrongful conversion, either by a tortious taking, or a refusal to deliver on demand, and also excluded the subject of a subsequent ratification.

APPEAL from the Circuit Court of DeWitt county.

Mr. E. H. PALMER, for the appellant.

Messrs. FULLER & GRAHAM, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

This was trover, brought by appellee against appellant and others, for a horse of appellee. There was a trial upon the

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Opinion of the Court.

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plea of not guilty; verdict of guilty returned, and appellee's damages assessed at \$115. Motion for new trial made, which was overruled by the court, and judgment rendered upon the verdict, to which exception was taken. The evidence and ruling of the court were preserved by the bill of exceptions, which purports to contain all the evidence given on the trial.

'The theory of the case, on the part of appellee, seems to have been that one Clemens, cousin of appellee, and boarding at her house, had the care and custody of the horse in question and its mate, for her, but had no authority to sell either of them; that while Clemens was having the horses boarded at the stable of one McMillan, J. T. Salter & Co. were buying horses for the army, and that they, through an agent, bought the horse in controversy of Clemens. We find in the record this stipulation: "It was agreed in open court that James T. Snell, as agent for Salter & Co., paid Clayton Clemens \$110 for said horse."

James T. Snell is not a party to the suit. There is no evidence that either of the defendants personally knew anything about the alleged purchase, or that they or either of them ever exercised any control over the horse, or that any demand was made upon them for it, before the bringing of the suit.

There was evidence tending to show that appellee, with knowledge of the sale by Clemens, ratified the act, and authorized him to buy another horse in place of the one sold.

This being the state of the case, the court, on behalf of the plaintiff, gave to the jury the following instruction: "That, unless they believe from the evidence that Clemens was authorized by the plaintiff to sell the horse in question, they will find for the plaintiff."

This was the only instruction given in the case. It excludes from the consideration of the jury the question whether the defendants were guilty of a wrongful conversion, either by a tortious taking, or a refusal to deliver upon demand. It also excludes from their consideration the question of a subsequent ratification.

## Syllabus.

The evidence fails to establish a cause of action, and the court below erred in instructing the jury, and refusing to grant a new trial.

The judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

## SARAH ALWOOD

v.

HENRY MANSFIELD *et al.*

1. **MORTGAGE**—*of a deed absolute in form.* In this case it is held, upon the facts, that a deed, absolute in form, was intended by the parties to have effect accordingly, and that the transaction showed nothing of the character of a loan, or of the relation of debtor and creditor.

2. **ATTORNEY AND CLIENT**—*of dealings between them—and herein, where a third person intervenes in the transaction.* A decree having been rendered declaring a right of redemption of certain premises, and the time fixed for the payment of the money having nearly elapsed, one of the parties in interest, who had sought the redemption, agreed with a third person to sell to him a portion of the land, as a means of getting the money with which to redeem the whole. The proposed purchaser suggested as a mode of getting the title, that the owners of the land should convey to their solicitor who had obtained the decree of redemption for them, and the solicitor then convey to the purchaser, the latter to assume the payment of the solicitor's fee for obtaining the decree, and which was contingent upon the redemption being accomplished. The matter was consummated in this mode. The land was sold for greatly less than its value, but it did not appear the party in interest who negotiated the sale was deceived by any matters between the purchaser and the solicitor, or that the latter exercised any undue influence over him. It was *held*, that while the transaction would have been impeachable, at the instance of the party who sought to obtain the means for redemption by a sale, if it had been between him and his solicitor, in its principal features, yet, upon the facts, it was regarded as a transaction, not with the solicitor, but with the purchaser, and the party who thus sought the arrangement could not invoke the rule governing the relation of attorney and client as a ground for avoiding the contract.

## Syllabus.

8. But the other parties in interest who joined in the deed to the solicitor, were differently situated. They were two sisters of the party who negotiated the sale, and had no knowledge of the real character of the transaction. On making the agreement, the solicitor prepared a deed for the whole of the land from his clients to himself, and sent it by his own agent to these two sisters to be executed by them, the solicitor's agent assuring them that the purpose of the deed was simply to enable the solicitor to obtain a loan on the land with which to redeem under the decree; and, on being questioned on the subject, the agent further assured them that the solicitor was a perfectly honest man and would give them a bond showing the character of the transaction, but that the deed must be made at once, as the time for redemption was about to expire. On these assurances the deed was executed, and on its return to the solicitor he at once conveyed to the purchaser the part originally agreed upon, at a price greatly below its value, the purchaser assuming the payment of the solicitor's contingent fee, and the proceeds of the sale were applied in redemption under the decree. The grantee of the solicitor knew of the fiduciary relation existing between his grantor and his clients, and was a direct party to the act of procuring the deed to the solicitor in the way it was done. It was *held*, the solicitor violated his obligation to his clients in deceiving them as to the purpose of the deed to him, and in attempting to sacrifice their land merely to secure his own fee. And his grantee, who participated in the fraudulent transaction, stood in no better attitude. So it was held such grantee should be deemed a trustee, by virtue of a constructive trust, in respect to that portion of the land belonging to those who had thus been betrayed by their solicitor.

4. The principles which govern the cases of dealings of persons standing in a fiduciary relation, apply to persons who clothe themselves with a character which brings them within the range of the principle; or, who take instruments, securities or moneys, with notice that they have been obtained by a person filling a position of a fiduciary character, from a person towards whom he stood in such relation.

5. And there is no distinction, in the application of those principles, between the case of one who himself exercises a direct influence, or of another who makes himself a party with the person who exercises the undue influence.

6. *SAME—of the burden of proof.* Where a third person was a party with a solicitor in a transaction with clients of the latter, and seeks to hold property thus secured, the burden is upon him, as it would have been upon the solicitor, to show that the transaction was in all respects just and fair.

7. A PURCHASER *pendente lite* will hold in subservience to the rights of the parties as finally determined in the pending litigation.

APPEAL from the Circuit Court of Sangamon county.

32—59TH ILL.

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Statement of the case.

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This was a suit in equity, instituted by Sarah Alwood, appellant, against Henry Mansfield and others, appellees, in the Mason circuit court, from which it was transferred to the Sangamon circuit court, where it was tried upon the pleadings and proofs, and the bill dismissed.

The principal facts established by the pleadings and evidence, are, that in the year 1856, one Andrew J. Alwood died intestate and seized in fee of certain lands, described in the bill, amounting to 1440 acres, but which lands were subject to a deed from said Alwood to one Elisha Ruckman. The deed was absolute upon its face, but was in fact given as security for the loan of \$1600 by Ruckman to said A. J. Alwood, and was intended as a mortgage only, but that, after the decease of said Alwood, Ruckman claimed an absolute title to the lands; that said A. J. Alwood died without issue, leaving the complainants, Sarah Alwood, Esther A. Phillips and Hugh M. Alwood, his brother and sisters, and Benjamin Alwood, his father, his only heirs at law; that by reason of Ruckman's said claim, it became necessary to institute a suit in equity against him to have said deed declared a mortgage, and to allow the parties interested to redeem, and for that purpose the heirs at law of A. J. Alwood, deceased, employed Manning & Merri-man, attorneys at law, practicing as co-partners in Peoria, to commence and conduct the suit to its final termination, agreeing to pay them an absolute fee of \$200, and a further fee of \$3000 contingent upon the success of the litigation. To secure the contingent fee, Hugh M. Alwood executed to Manning & Merriman his mortgage deed upon the lands in question in that litigation; that the suit was instituted, and such proceedings had therein that, in the summer of 1861, a decree was made declaring said deed to Ruckman to have been a mortgage, and giving the heirs of A. J. Alwood the right to redeem by paying to Ruckman the sum of \$2000 by the 15th of November, 1861.

It appears that in February, 1861, Benjamin Alwood, the father, died intestate, leaving Sarah and Hugh M. Alwood and Esther A. Phillips his only heirs at law.



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Statement of the case.

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It appears that up to near the time for the payment of the \$2000, under the decree against Ruckman, the parties complainant in that suit had relied upon their solicitors, Manning & Merriman, to raise the amount by security upon the land, but they having failed, and the parties themselves being unable to do so, about the 13th of November, 1861, application was made by Hugh M. Alwood to Mansfield, the defendant, to loan the amount required, and take security on the land. This he refused to do, but expressed a willingness to pay the \$2000 on a purchase of 1000 acres of the 1440 acres.

After considerable negotiation between Mansfield and Manning & Merriman, it was proposed by Mansfield that, if Manning would procure a deed from his clients to himself, and Manning & Merriman would release their mortgage, he would advance the \$2000 and take an absolute conveyance from Manning. This arrangement was made in Manning's office, in Peoria, in the absence of both Sarah Alwood and Esther A. Phillips, both of whom resided on the land thus proposed to be conveyed to Mansfield. But Hugh M. Alwood was present and participated in the arrangement, to carry which into effect, one C. P. Taggart, a young lawyer who was occupying Manning's office, was furnished by Merriman with a deed prepared by the latter, for the whole 1440 acres, to be executed to Manning by the Alwoods and Mrs. Phillips. Being furnished with this deed, he was sent by Merriman to Mason county, where Sarah Alwood and Mrs. Phillips were residing upon the land, to get it executed by them, Merriman guaranteeing him his pay for going, and Mansfield, having notice of his mission, employed him to investigate the title and see if it was good in the Alwoods. He went, and Hugh M. Alwood accompanied him.

It appears from the evidence that Taggart represented himself to Mrs. Phillips, who appears to have acted for her sister, as Manning's agent, and both Taggart and Hugh M. Alwood represented to her that the deed to Manning, which these

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Statement of the case.

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females were requested to execute, was simply for the purpose of enabling Manning to borrow money in order to comply with the Ruckman decree, Taggart saying that he understood that, unless the deed was made in time for him to get back to Peoria by the next morning, the land would be lost, or it would be too late to comply with the decree; that Mrs. Phillips inquired of Taggart what kind of a man Mr. Manning was, and he assured her that he was perfectly honest. She asked for a bond back, but was told that, although they had none prepared, yet Mr. Manning would give back a bond. Upon these assurances, the deed was executed, and immediately placed upon record by Taggart, who also investigated the title and found it good in the Alwoods, and free of incumbrance, except the mortgage to Manning & Merriman. Upon returning to Peoria, he first reported the results of his mission to Merriman, and next to Mansfield, and the state of the title. Nothing was paid or agreed to be paid by Manning, or any person for him, to Mrs. Phillips or Sarah Alwood, for the conveyance, nor was any intimation made of the arrangement to sell absolutely to Mansfield. Nor had Hugh M. Alwood any authority to make any such sale.

Upon obtaining the deed in this manner, Manning & Merriman carried the arrangement with Mansfield into effect by Manning executing to him an absolute deed for the 1000 acres, and Mansfield paying the \$2000 to the clerk of the circuit court in discharge of the Ruckman decree, Manning & Merriman releasing their mortgage executed by Hugh M. Alwood, but taking Mansfield's agreement to pay them the amount of it out of the proceeds of the lands.

It appears that the lands conveyed to Mansfield by Manning were worth at that time from \$15,000 to \$20,000, and that they have since greatly advanced in value; that they lie in a body, and were very good land; that Manning afterwards conveyed back to his clients 440 acres of the lands, but which were of a poorer quality, and worth only about \$3000.

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Statement of the case. Opinion of the Court.

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It was made a condition of the transaction that Hugh M. Alwood should take from Mansfield a lease of all that portion of the 1000 acres which was under cultivation.

It also appears that Mansfield was fully aware, at the time, of the relation of solicitor and client existing between Manning & Merriman, the Alwoods and Mrs. Phillips, and of the existence of the mortgage from Hugh to his solicitors.

It also appears that, in September, 1864, Hugh M. Alwood and Esther A. Phillips conveyed all their interest in the lands to the complainant.

Mr. H. E. DUMMER, Messrs. LACEY & WALLACE, and Mr. S. P. SHOPE, for the appellant.

Messrs. HAY, GREENE & LITTLER, and Mr. B. S. PRETTYMAN, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court :

It has been strenuously insisted by counsel for appellant, that the conveyance to Mansfield, although absolute in form, was, nevertheless, but a security for a loan, and should, therefore, be declared a mortgage, and appellant, who has succeeded to all the rights of her co-tenants in the lands, be permitted to redeem.

This case has been twice considered by the court, and much care and deliberation given to it. It is the opinion of all the members of the court, that the arrangement between Manning & Merriman, Hugh M. Alwood and Mansfield, under which both the deed to Manning, by his clients, and from him to Mansfield, were made, contemplated, as between these immediate parties, an absolute sale to Mansfield of the 1000 acres of land conveyed to him. The transaction shows nothing of the character of a loan, or of the relation of debtor and creditor. The weight of the evidence is almost wholly in favor of an absolute sale, and will justify no other conclusion.

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Opinion of the Court.

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The next question in the natural order of this case is, whether, under the evidence, the transaction is impeachable, so far as relates to the interest of Hugh M. Alwood. It is the opinion of a majority of the court that it is not. If it had been between him and his solicitors, in its principal features, the case would have been different. But his position is this: He first applied to Mansfield for a loan. The latter expressly refused to make any loan on the land, but suggested a willingness to purchase and pay for a portion of the land. The unwillingness of Mansfield to make a loan, or rather his determination not to, must have been understood by Hugh M. Alwood, if he was a sane man. Then Mansfield proposed that if Manning would obtain a deed from Hugh and his sisters, he would purchase the 1000 acres, and pay the amount of the Ruckman decree. Hugh M. Alwood assented to this. Here he was dealing with Mansfield, between whom and himself no confidential relation existed. If he was deceived by any matters between Mansfield and Manning & Merriman, or if the latter exercised any undue influence over him, the case does not show it. The case, so far as he is concerned, was, from the beginning and throughout, based upon the ground, that the transaction was of the character of a loan and security, and not an absolute purchase. The entire weight of the evidence is against this theory, and so far as the evidence discloses, there is not only no basis for the position, but explicit and extraordinary pains were taken at every step of the business to have him understand that it was not a loan and security, but an absolute sale.

A man has no right to wilfully and perversely shut his eyes against the real nature of a transaction, and then, without proof of deception and fraud, ask a court of equity to give him relief on the ground that he understood it differently from what it was.

If he was deceived by his solicitors, he has failed to show it. The emergency was great and pressing, we admit, but in every other respect he and Mansfield dealt at arm's length.

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Opinion of the Court.

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There was no confidential relation between them. He was privy to the entire arrangement for Manning to obtain the deed from his sisters, and convey absolutely to Mansfield. He could not have misunderstood it, and is guilty of the unpardonable conduct of going with Taggart to his sisters and representing to them that the deed to Manning was only to enable the latter to borrow money to pay off the Ruckman decree, when he must have known, if sane, that the purpose of it was to make an absolute sale of 1000 acres of the best of the lands for a sum merely sufficient to discharge that decree.

But it is the opinion of a majority of the court, that the case, as respects the interest of Sarah Alwood and Esther A. Phillips, stands upon an entirely different footing. At the time they executed the deed to Manning, he and Merriman were their solicitors in a suit involving these very lands. Taggart came to them with a deed which had been prepared by Merriman, representing himself as the agent of Manning, requesting them to execute it. He told them that the object of the deed was to enable Manning to use the lands as security in raising the sum requisite to comply with the Ruckman decree, the time for which had, as they knew, nearly expired. He said that he understood that, unless the deed was made in time for him to go back to Peoria by the next morning, the land would be lost, or it would be too late to comply with the decree. Mrs. Phillips asked him what kind of a man Mr. Manning was. Taggart assured her he was a perfectly honest man, and would do as Hugh requested. She wanted a bond from Manning for their protection. Taggart assured her that it should be all right. Under these circumstances, without any intimation as to the arrangement already made, to sell 1000 acres of these lands absolutely to Mansfield, and acting under the belief created by the representations made to them, that the purpose of the deed was to enable Manning to use the lands as security to raise money with which to comply with the Ruckman decree, and without consideration, these two

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Opinion of the Court.

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females, the clients of Manning & Merriman, executed this deed to one of their solicitors.

The rules of law, relative to the duties of solicitors, are quite familiar. It is the duty of the solicitor to protect the interest of his client. The client is entitled to the full benefit of the best exertions of his solicitor; and the solicitor may not bring his own personal interest, in any way, into conflict with that which his duty requires him to do on behalf of his client.

Manning & Merriman had a special and pecuniary interest in having the Ruckman decree complied with, for without such compliance their mortgage was worthless. This interest was the motive, on their part, for the arrangement with Mansfield.

Although by it they were to release their mortgage on the land, yet they were to have an agreement for its payment out of the proceeds of the land. When, by this arrangement, 1000 acres of the best of these lands were to be sacrificed as to their clients—a sacrifice of \$10,000, at least, for the sake of securing their mortgage for \$3000—is it not manifest that they thereby brought their own interest into direct conflict with their duty to their clients?

Their clients were a brother and two sisters, who were tenants in common of the lands. Their duty was to each individually. If they saw that the brother was willing to join with them in a scheme to sacrifice the interests of his sisters, was it any palliation of the wrong on their part, that they were enabled to superadd to their own influence, growing out of the relation of solicitors and confidential advisers, that of a brother who had a similar dominion over the minds of these unprotected females?

Not by any means. If these solicitors discovered that the brother was willing to lend his influence to the attempt to obtain this deed, it was their duty to intervene, apprise their clients and prevent the contemplated wrong, as readily as if he had been a stranger, instead of a brother. When, therefore, Merriman put into Taggart's hands the deed to be executed,

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Opinion of the Court.

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which was to cut off these female clients forever from the lands bargained to Mansfield, it was his duty to inform Taggart, if he was not already informed, of the proposed absolute sale, and require him to fully disclose it to these clients before they were asked to execute the deed.

If Merriman had obtained the execution of the deed in person, could there have been any doubt of his duty to make a full disclosure? And will it be tolerated that an attorney or solicitor may avoid that duty and obtain the conveyance of valuable property from clients without consideration, by sending a clerk instead of going in person?

But, it is said that Taggart was the mere agent of Hugh M. Alwood.

It is venturing rather too far upon the credulity of the court to take that position in the face of the testimony in this case, which, from its very nature, calls for the severest scrutiny of a court of equity. It is not an uncommon artifice, in cases of overreaching and fraud, to so manage the transaction that the instrument, through whom the fraud is perpetrated, shall appear to be the agent either of the victim, or of some person other than the one who reaps the benefit of the fraud. It is true that Mansfield told Taggart that he would not pay him for going, but if he did go, he wanted him to investigate the title and see if it was good in the Alwoods. It was so managed that Hugh should first speak to Taggart about going. Still Merriman prepared the deed for his clients to execute, directed him to get it done, and at the same time guaranteed him his pay for going. Taggart was, at that time occupying Manning's office, and it appears, though rather obscurely, that he had studied law with Manning & Merriman, and was very familiar with the Ruckman litigation. He testifies himself, that he understood, at the time he went, that Manning & Merriman had a mortgage for \$3000, their fees in the Ruckman case, and that if the decree was not complied with by the 15th of November, 1861, they would lose their fee. And

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Opinion of the Court.

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when he saw the women, he, as several witnesses testify, represented himself as Manning's agent. Then, when he returned, to whom did he report the result of his mission? To Hugh M. Alwood? By no means. He first accounted for his agency to Merriman, who gave him the deed to get executed, informing him that it was executed and placed upon record. He then reports to Mansfield that he had investigated the title, found it good in the Alwoods and free from incumbrance, except the mortgage to Manning & Merriman.

The only remaining question is, whether Mansfield is so far affixed with notice as to place him in the position of Manning, in respect to the acquisition of the deed to the latter. The evidence shows, most conclusively, that he knew of the existence of the relation of solicitors and clients between Manning & Merriman, and Sarah Alwood and Mrs. Phillips; that he knew of the existence of the mortgage Manning & Merriman held, and its origin. Knowing these facts, and the pressure of circumstances under which the Alwoods were placed in regard to the Ruckman decree, Mansfield was the one who proposed that Manning should obtain from his clients the deed which was to enable the former to obtain a title to this land for less than a third of its actual value, and Manning & Merriman to secure their \$3000 without further trouble. He knew that a purchase by Manning was not contemplated, and that the only means of obtaining the deed was through the confidential relation subsisting. He was a direct party to the act of sending Taggart to obtain the deed in this way.

"The principles," says an excellent author, "which govern the cases of dealings of persons standing in a fiduciary relation, apply to persons who clothe themselves with a character which brings them within the range of the principle; or, who take instruments, securities or moneys, with notice that they have been obtained by a person filling a position of a fiduciary character, from a person towards whom he stands in such relation." Bump's *Kerr on Frauds*, 152, and cases in note 4.



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Opinion of the Court.

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And again, on page 194, the same author says: "In the application of the principles of the court, there is no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the person who exercises the undue influence."

Mansfield, by making himself a party with Manning & Merriman, who filled the position of a fiduciary character towards those from whom the deed was obtained, was just as much bound to show, to the satisfaction of the court, that the parties to the deed were, notwithstanding the relation, substantially at arms' length and on an equal footing, and that nothing had happened which might not have happened had no such relation existed, as Manning would have been, if the controversy were between him and his clients. The burden was upon him, under the circumstances of this case, as it would have been upon the solicitors themselves if they had attempted to hold the lands to the exclusion of the rights of their clients, to show that the transaction was in all respects just and fair. Instead of assuming that burden and making the proof required by an inflexible rule of public policy, none is attempted, and the evidence stands uncontradicted that the deed was obtained by concealment, misrepresentation and contrivance.

"Whenever the circumstances of a transaction are such that the person who takes the legal estate in property, can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment." Hill on Trustees, 144.

It is the opinion of a majority of the court, upon the whole case, that Mansfield should be declared a trustee for complainant, by virtue of a constructive trust, as respects and to the extent of all that portion of the land conveyed to him by Manning, which belonged to complainant and Esther A.

## Opinion of the Court.

Phillips, as heirs at law of A. J. and Benjamin Alwood; that upon an account being taken and stated by the master, in accordance with the rules and practice of equity in cases between trustee and *cestui que trust*, of the whole amount paid by Mansfield, to apply on the Ruckman decree, and all moneys expended by him in payment of taxes legally levied, or for necessary repairs upon the premises, with legal interest, and deducting therefrom all that he may have received as the rents, issues and profits of the land; then from the balance, if any there be, thus chargeable upon the whole lands, an amount should be ascertained bearing the same proportion to the whole sum, so chargeable upon the lands, as the portion and share of complainant and Esther A. Phillips therein, as such heirs at law, shall bear to the whole lands conveyed. This proportionate sum should be required to be paid by complainant in ninety days from the entry of the decree; and upon payment thereof within the time prescribed, the legal title of such portion as belonged to complainant and Esther A. Phillips, as aforesaid, should be required to be conveyed to complainant.

Nor will the court be prevented from making such final determination of the cause on account of the purchase by Prettyman, *pendente lite*, set up in defendants' answer; but such conveyance will be held in subservience to the rights of the parties in this litigation.

The decree of the court below dismissing the bill must be reversed and the cause remanded, with directions to the court below to proceed and render a decree in conformity with this opinion.

*Decree reversed.*

JAMES A. HARPHAM *et al.*

v.

## THOMAS LITTLE.

1. *EVIDENCE—in ejectment.* Where a plaintiff in ejectment read in evidence certain deeds in his chain of title, to which there was no objection in matter of form, or in respect to their execution or acknowledgment, it was held to be error to exclude them from the consideration of the jury, although there was some evidence of title to the remote grantors of the defendant, from the common source, prior in date to those deeds. The validity of such title of the defendant was questioned, and any danger of a misconception of the true state of the title from the deeds excluded, could have been obviated by proper instructions. Being pertinent to the issue, they should have been left to the consideration of the jury.

2. *SAME—of a deed executed pending an injunction in respect thereto.* In ejectment, the plaintiff read in evidence a deed to himself, which was executed pending an injunction restraining the grantor from making any disposition of the property; but an objection upon that ground was held not tenable. The defendant in ejectment was not a party to the injunction suit, which was for the benefit of the complainants therein, particularly; and even if the grantor of the defendant had an interest in the subject matter of the injunction, in the pending action neither of them had any cause for complaint.

3. Moreover, the complainant in the injunction suit had, under the authority of the decree therein, conveyed to the same grantee, and it was a fair presumption that the deed thus objected to was executed in harmony with, and carrying out the wishes of the complainant, who had obtained the injunction.

4. *EVIDENCE of the recording of a deed.* Where a prior deed is sought to be given in evidence to affect rights claimed under a subsequent deed, if it be attempted to show by parol that the former deed was recorded, with a view to notice, the time of the recording should be shown.

5. But parol evidence is not the best evidence to show that a deed was recorded, and should not be allowed unless the proper foundation is laid for secondary evidence.

6. *SUBSEQUENT PURCHASER under a decree—of his rights as against a prior unrecorded deed from the parties to the decree.* A decree in chancery authorized the sale and conveyance of "all the interest" of the parties in the suit, in and to certain land therein described, and the land was sold under that decree. The bill alleged that the parties, complainant and

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Syllabus. Statement of the case. Opinion of the Court.

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defendant, were the owners of the land, and that it had never been disposed of or conveyed by them. The decree found that allegation to be true. In fact, however, the parties had previously conveyed the land by deed, but which was not recorded at the time of the sale under the decree. It was held, in view of the allegations in the bill in respect to the title, the finding of the court thereon, and the absence of the prior deed from the record, the words "all the interest," found in the decree and in the deed made under it, should not be construed as a limitation of the estate conveyed, so as to give any effect to the prior unrecorded deed as against the purchaser under the decree.

7. Such a conveyance as that made under the decree is unlike a deed of release and quit claim, by which the grantor only undertakes to convey the interest he has, but it passes the entire title, without regard to a prior unrecorded deed from the same parties.

8. *LIMITATION act of 1839—of payment of taxes by an adverse party after the bar is complete.* Where a party has paid taxes on land, under color of title, for seven successive years, and possession has followed or accompanied such payment of taxes, so as to create a bar under either the first or second section of the limitation act of 1839, then such bar will not be interrupted by the subsequent payment of taxes by the holder of the paramount title.

APPEAL from the Circuit Court of Mason county.

This was an action of ejectment, brought in the court below by James A. Harpham and Lewis W. Ross, against Thomas Little, to recover lot number 10 in block number 40, in the town of Havana, Mason county.

The final trial resulting in favor of the defendant, the plaintiffs appealed.

The opinion of the court contains a sufficient statement of the case for an understanding of the questions decided.

Messrs. Ross & Ross, Mr. J. S. WINTER, and Mr. J. S. BAILEY, for the appellants.

Mr. B. S. PRETTYMAN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The record in this case was burned in the fire in Chicago, in October, 1871, and as the abstract is not full, we may have misapprehended, and may misstate portions of the evidence.

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Opinion of the Court.

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It was certainly error, after they had been introduced and read to the jury, to exclude from their consideration the deeds from the heirs of O. M. Ross, from the Littles, and from Aiken, to L. W. Ross. Though there was some evidence of title, from the common source, to the remote grantors of the defendant, prior in date to the date of these deeds, yet the validity of such title was questioned. No objection was taken to the form, execution or acknowledgment of the deeds. They were pertinent to the issue, as they were links in the plaintiffs' chain of title, and were, therefore, proper for the consideration of the jury. If there was any danger of a misconception of the true state of the title, from them, that could easily have been removed by instructions.

It is said that the deed from Aiken to plaintiff Ross, should not have been read, because it was made pending an injunction in the chancery proceeding in the Peoria circuit court, prohibiting him, as one of the defendants, from the sale and conveyance of any of the real estate described in the decree.

Concede this to be true, who has the right to complain of the violation of the injunction?

The defendant was not a party in the chancery suit, and the purpose of the decree, in the restraint imposed on defendant Aiken, was for the benefit of the complainants particularly. Even if the grantors of the defendant had an interest in the subject matter of the injunction, in this case neither they nor the defendant had any cause of complaint. The complainants were authorized, by the decree, to sell and convey the lands therein mentioned; and they had conveyed to the same party to whom Aiken made the deed. The fair presumption is, that he was acting in harmony with, and carrying out the wishes of, the complainants. There was no valid objection to the deed on the ground indicated.

Without an enumeration of the several deeds, it is sufficient to say that the plaintiffs proved a perfect title by the introduction of deeds, and the record of the chancery suit in the Peoria circuit court.

## Opinion of the Court.

The defendant introduced a deed from the ancestors of the parties to the chancery suit to Mark M. Aiken, which was prior in date to the decree, but not recorded until after the sale and conveyance under it, to L. W. Ross. This raises the question as to the rights of Aiken and his grantees to the land in dispute, against the title of Ross, acquired by the deed from the complainants in the suit in chancery.

Indeed, the evidence of any record was incompetent. When the deed to Aiken was offered, in connection with parol evidence, plaintiffs objected, and the objection should have been sustained. The evidence of Aiken was, that the deed was not recorded in Mason county at the time received, but was afterwards; but he did not state when. He also stated that it "was recorded in Tazewell county," but the time is not given. Besides, this was not the best evidence of the fact of record, and no foundation was laid for secondary evidence.

But appellee contended that the parties to the chancery suit had conveyed their title before the decree; that, as the decree only empowered the sale and conveyance of the interest of the parties, nothing else could be conveyed; and that therefore no title passed, as against previous *bona fide* purchasers who held a good conveyance.

To sustain the argument, the following cases are cited: *McConnell v. Reed*, 4 Scam. 117; *Butterfield v. Smith*, 11 Ill. 485; *Hamilton v. Doolittle*, 37 ib. 473; *Brown v. Jackson*, 3 Wheaton, 449.

These cases merely establish the doctrine that a prior, unrecorded deed, containing the usual covenants of warranty, will hold against a subsequent quit claim deed to the same land, and recorded, and which contains express limitations against a second grant of the same land, or which must be construed as not embracing the land previously conveyed.

In the same cases, it is also held that a deed of release and quit claim will transfer title to land as effectually as a deed of bargain and sale, and that the prior record of such deed will give it a preference over one previously executed to the same

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Opinion of the Court.

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land, and subsequently recorded, unless the intention is clearly manifest not to include the land in the former deed.

In none of the cases cited was the deed made under a decree. The sales and grants were by private persons, and in some of them there was almost an express exclusion of the land first conveyed from the operation of the subsequent deed.

In the construction of the deed executed by virtue of the decree, we must consider the whole record—the bill as well as the decree.

The bill contained the express allegation that the lands therein mentioned were then owned by the parties, complainant and defendant, and had never been disposed of or conveyed by them. The court found the allegation to be true, and the record of deeds was in harmony with the finding. A decree was then rendered, conferring full authority to sell and to convey “all the interest” of the parties. In view of the allegations in the bill, the finding of the court, and the record of deeds, these words, “all the interest,” should not be construed as a limitation of the estate conveyed in the deed executed by virtue of the decree. The bill alleged title in the parties, and the court so adjudged. The deed <sup>was</sup> unlike a deed of release and quit claim, by which the grantor only undertakes to convey the interest he has. If he has no right or title, he transfers none. The grantee is presumed to know the nature of the conveyance, and, with that knowledge, pays the consideration.

This is not true as to the purchaser at this judicial sale. He bought, not a bare interest, not a possibility, but a title which the court had found, and the record showed the parties had. He did not know the parties, and was not negotiating a purchase from private persons. The decree and the record evidenced title, and he had the right to rely upon them. When we consider the decree and the bill together, the necessary conclusion is, that the parties had the title; and when this is supported by the public records, the inference can not be

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Opinion of the Court.

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avoided, that the purchase was in good faith, and that a perfect title was obtained. In any other view, the decrees of the courts would be only a snare, and the registry acts no protection to purchasers.

This deed was made to carry out a sale under a decree in chancery. If the court had jurisdiction of the subject matter, and of the parties who had an interest, as shown by the record, or by proper notice, then a subsequent reversal of the decree could not affect the title of the purchaser. Washburn says such a deed "is evidence of title in the grantee against all the world." 2 Wash. R. P. 540.

We should advert to one other question. The plaintiff Harpham, had a deed in 1851. No objection is made to it as color of title under either the 8th or 9th sections of the conveyance act. He paid taxes from 1852 to 1858 inclusive. If possession followed or accompanied the payment of taxes, so as to create a bar under either section, this bar was not interrupted by the payment of taxes in 1859 by the defendant.

The proof in the abstract as to the character of the possession is so meagre that we do not determine as to a bar under either section. This can be more fully developed upon another trial.

We do not think that the record before us shows any notice to the purchaser under the decree, of the existence of the unrecorded deed prior to the purchase.

The judgment is reversed and the cause remanded.

*Judgment reversed.*



VAN S. COOKSON

v.

MARY TOOLE.

1. **MARRIED WOMEN**—*of remedies against them upon contracts in respect to their separate property—whether at law or in equity.* So far as relates to the engagements of a married woman, not within the capacity to contract given, by implication, by the act of 1861, the remedy, when a proper case exists, must be sought under the rules in relation to the general contracts of married women and their binding effect upon their separate estates, in equity, as under the old forms of settlement before the statute, because, in that case, the implication of capacity to bind her separate estate arises only in equity.

2. But the implication of capacity to contract in respect to her separate property arising under the statute, is an implication of law, and being an implication of law, and not of equity, the capacity to contract within the scope of the implication is a legal capacity, and all contracts under it are legal contracts, cognizable by courts of law.

3. So it is *held*, that an action at law will lie against a married woman to recover for work and labor done and performed at her request, in and about the improvement and cultivation of her farm, and in taking care of her stock thereon, such farm and stock being her sole and separate property, owned and held by her under the provisions of the act of 1861.

4. **FORMER DECISION.** So far as the case of *Mitchell v. Carpenter*, 50 Ill. 470, holds that the remedy against married women in respect to their contracts relating to their separate estates under the statute, is not at law, but only in equity, a question not involved in that case, it is to be regarded as mere *obiter dicta*.

WRIT OF ERROR to the Circuit Court of Logan county.

Messrs. BEASON & BLINN, for the plaintiff in error.

Mr. JAMES T. HOBLITT, for the defendant in error.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was an action of *assumpsit*, brought by plaintiff against defendant to recover for work and labor done and performed by plaintiff for the defendant at her special instance and request.

## Opinion of the Court.

The plea of coverture was interposed, to which plaintiff replied that the work and labor in the declaration mentioned were done and performed in and about the improvement and cultivation of defendant's farm, and in taking care of her stock thereon, which farm and stock were her sole and separate property derived from persons other than her husband, held and enjoyed by her for her sole benefit, and without the control or interference of her husband. The court sustained a general demurrer to the replication and rendered final judgment against plaintiff, who brings the record to this court by writ of error.

The question presented is, whether a married woman, holding property under the act of 1861, can bind herself, at law, for work and labor performed in respect to property so held, and is one which has not, heretofore, been directly presented in this court.

In the absence of any statutory provisions, the separate estate of a married woman is the mere creature of equity. Having recognized her separate estate, courts of equity were constrained, by the logic of the position, to regard her as clothed with a qualified capacity by implication, and in some instances even beyond the capacity conferred by the instrument of settlement, to deal with respect to such separate property as a *feme sole*.

There is a conflict of authorities upon the question, whether, in case the instrument under which she acquired her separate estate specified the mode and purposes of alienation or disposal, she could dispose of it in any other mode, or for any other purpose than that pointed out; or whether she could sell, convey, alienate, or in any way charge her separate estate, unless such power was expressly given her in the deed of trust or settlement. The decisions in England and New York, though somewhat conflicting, hold, in substance, that a *feme covert*, with respect to her separate property, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless

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specially restrained by the instrument under which she acquired her estate. Perry on Trusts, sections 564, 565, 660; *Hulme v. Tenant*, 1 Lead Cases in Equity, \* 394, and cases in notes.

In *Swift v. Castle*, 23 Ill. 209, this question was presented, and in the opinion of the majority of the court and the dissenting opinion of Mr. Justice Breese, the authorities bearing upon both sides of the question were laboriously collected and fully reviewed, and although a majority of the court held that a married woman could only convey her trust property in the manner authorized and for the purpose specified in the instrument creating the trust, if it contains any such provisions, yet it was conceded that, in the absence of such provisions, and property is conveyed or devised to her separate use, equity gives her the power of controlling it by sale or otherwise. Again, the authorities present a further conflict upon the extent of her capacity in equity, and whether her general contracts could be satisfied out of her separate estate. In England it was held that if a married woman, having property to her separate use, give a written instrument to pay money, the implication of law is, that she intended to charge her separate estate. Perry on Trusts, sections 657, 659, 660.

In New York, her power in equity was limited to the power of contracting in relation to her separate estate, or for the benefit of such estate, or for her own personal benefit upon the faith and credit of such estate. By that rule, her general engagements, which have no reference at the time to her separate estate, or to her own personal benefit, can not be enforced against such separate estate. Perry on Trusts, sec. 660, and cases cited in notes.

The origin of the recognition by equity of a wife's separate estate is traceable, we apprehend, to the early and unquestioned jurisdiction of the court of chancery over trusts, and the primary purpose was to effectuate the intention of the settler or donor that she should enjoy certain property set apart for her use, to the exclusion of the marital rights of the

husband, and free from his interference and control. When such intention clearly appeared, and no trustee was appointed, the court of chancery would protect her interest in the property against the creditors of the husband, and he would be considered as a trustee, notwithstanding he was not a party to the instrument under which the wife claimed. 2 Kent's Com. 162, 163.

When the court assumed cognizance of such trusts, and sought to carry the intention of settlers and donors into effect, the subject became, and ever has been, beset with difficulties, growing out of an attempt to recognize the principles of the common law, and at the same time to apply the principles of equity. At the common law the husband and wife are treated, for most purposes, as one person. The very being or legal existence of the woman, as a distinct person, is suspended during the marriage; or, in other words, is incorporated and consolidated with that of her husband. The husband became entitled to receive the rents and profits of his wife's lands during their joint lives; he became absolutely entitled to all of her personal property in possession, and to all her *choses in action* if he reduced them to possession, during his life. She could bind herself by no contract, not even for necessaries. But, if the intention of the settler or donor was to be carried into effect, and the trust enforced, it became necessary for equity to treat husband and wife, for many purposes, as the civil law treats them, as distinct persons. 2 Story Eq. Jur. sec. 1368. The scope of the trust was to provide for the wife's enjoyment of property exempted from the marital rights of the husband, and freed from his interference or control. Such enjoyment must be such, in a measure at least, as was incident to the ownership of property, by persons not under disability. To this end she must be deemed invested with a qualified capacity wholly denied by the common law, to deal with respect to her separate estate by contracting; or, as equity judges were accustomed to say, by entering into *engagements* with respect to such separate estate.

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Opinion of the Court.

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From this recognized right of enjoyment, then, also was recognized a reciprocal obligation in equity, of having such estate chargeable with the performance of such engagements—the essence, however, being that she was clothed with a qualified capacity, by implication, of incurring debts and liabilities to be paid out of her separate property, and to incur debts and liabilities, is, after all, but making contracts.

But, as the estate itself was a matter of purely equitable cognizance, so were the incidents belonging to it. These engagements, liabilities or contracts were still unrecognized by the common law; they did not bind her personally, but were subject to enforcement only in equity, and *there* only against her separate estate, the creature of equity.

Such being the general character and incidents of the separate estate of a married woman before the statute of 1861, it remains to be considered what change, if any, was effected thereby. That there was a material change produced as to the nature of the estate and many of its incidents, there can be no doubt. For, by the statute, she may take the legal title to property both real and personal, when derived from persons other than her husband, wholly exempt from the marital rights of the husband at common law, and free from his control or interference during coverture. Such property, the statute declares, “shall be and remain, during coverture, her sole and separate property, under her sole control, and be *held, owned, possessed and enjoyed* by her the same as though she were sole and unmarried.”

An estate so derived is no longer the mere creature of equity, dependent upon its power alone for protection, and its principles for the right of enjoyment; but, in all cases, when, by the nature of the gift, bequest, devise, conveyance or deed of settlement, an absolute legal title would be vested in a *feme sole*, the same title would, under the statute, be vested in a *feme covert*, and the property be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried. When the estate is thus transformed from an *equitable*

to a *legal* estate, all of the rights incident to it must be legal rights. So far as the statute goes, her disability and her husband's marital rights are alike swept away. When her right of property is invaded, even though by her own husband, instead of applying to equity for redress, as formerly, she may now resort to the appropriate action at law. *Emerson v. Clayton*, 32 Ill. 493.

If the right to a separate estate, as recognized by equity before the statute, carried with it, by implication, a qualified capacity to deal with it as a *feme sole*, why does not the legal right conferred by the statute carry with it, by implication, all that degree of legal capacity necessary to the enjoyment of such legal right? For, how can she possess and enjoy a separate estate which is made subject to her sole control, the same as though she were unmarried, unless she can put it to the same uses that an unmarried woman might? An unmarried woman has the same legal capacity, the same right of control over her own property, if of full age, as a man may have.

In the case at bar, the separate estate, as is alleged in the replication, was derived from persons other than defendant's husband; it consisted of a farm under cultivation, with implements and stock, subject to her sole control, and managed for her sole use and benefit. The measure of her right to hold, own, possess and enjoy this property, is that which an unmarried woman would have. This right must, by necessary implication, carry with it all the incidents to such a degree of enjoyment of property, and one of those incidents is a legal capacity to contract for servants and laborers. For, without such a capacity, and with the known incapacity to make such contracts, her horses might die for want of surgical aid, her stock perish in winter for want of care, and her fields go uncultivated in spring for want of a farmer to till them.

In *Mitchell v. Carpenter*, 50 Ill. 470, the court said: "It may be said that a married woman can not adequately enjoy her separate property unless she can make contracts in regard to it. This is true, and hence her power to make contracts so

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far as may be necessary for the use and enjoyment of her property, must be regarded as resulting by implication from the statute. If she owns houses, she must be permitted to contract for their repair or rental. If she owns a farm, she must be permitted to bargain for its cultivation and to dispose of its products."

That case was an action at law against a *feme covert* and her husband, to recover upon a promissory note given for the purchase of land, and it was held that she was not liable. The correctness of the decision of the case is not questioned. There, the contract was one not falling within the implied capacity given by the statute. But, at the close of the opinion, it was said: "We will further add that, in our opinion, all remedies against married women upon contracts, even if they relate to their separate property, should be sought upon the equity side of the court, where such kind and degree of remedy may be given as the nature of each case and the equities of the parties may require, and where jurisdiction over the property rights of married women has ever resided."

These observations, so far as they related to the transaction involved in that case, were, doubtless, correct; but, so far as they related to contracts in respect to her separate estate, under the statute—a question not there involved—they must be regarded as mere *obiter dicta*. They appear to inadvertently assume that the separate estate of a married woman, even under the statute, is still a mere creature of equity—whereas, in the aspect of it under consideration, in the case at bar, it must be regarded as an absolute legal estate, in which case the rights incident to it must be legal rights, for the redress of which she may have an action at law, even against her own husband, as was said in *Emerson v. Clayton*, *supra*.

So far as relates to her engagements not within the capacity given by implication of the statute, the remedy, where a proper case exists, must be sought under the rules in relation to the general contracts of married women and their binding effect upon their separate estates, in equity, as under the old

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forms of settlement. Because, in that case, the implication of capacity to bind her separate estate arises only in equity. But the implication of capacity to contract in respect to her separate property, arising under the statute, is an implication of law, and being an implication of law, and not of equity, the capacity to contract within the scope of the implication is necessarily a legal capacity, and all contracts under it must be legal contracts, cognizable by courts of law.

It is the opinion of the court that the matters alleged in the replication, to which the court sustained the demurrer, were sufficient in avoidance of the plea of coverture, and that the demurrer should have been overruled.

The judgment of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

*Judgment reversed.*

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ROBERT HOXSEY *et al.*

v.

WILLIAM PATTERSON *et al.* Admr's.

1. *BOND for the payment of money—extent of recovery thereon.* In an action on a penal bond, conditioned for the payment of the penal sum at a specified time, the introduction of the bond in evidence will establish a *prima facie* case for the plaintiff for the full amount, as debt, and if interest after maturity is recoverable, that should be allowed as damages.

2. *JUDGMENT—its effect.* If, however, the judgment in such a case provides that the debt be discharged upon payment of a less sum found as damages, then the payment of the damages will operate as a satisfaction of the whole bond.

APPEAL from the Circuit Court of Madison county.

Mr. DAVID GILLESPIE, for the appellants.

Mr. A. W. METCALF, for the appellees.



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Opinion of the Court.

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Mr. JUSTICE MCALLISTER delivered the opinion of the Court :

This was an action of debt, in the Madison circuit court, brought by appellees as administrators of William Dorsey, deceased, against appellants, impleaded with Thomas S. Shirley, upon a bond bearing date the 26th of June, 1858, made by appellants and said Thomas S. as obligors, to appellees as administrators, etc., obligees. The bond was declared upon, and is in the penal sum of \$3602.55, conditioned for the payment by the obligors of that sum to the obligees, as follows: One-third of said sum to be paid in six months, and the balance in twelve months from the date of the bond.

Appellants, who alone were served with process, appeared and filed the pleas of *nil debet* and payment. To the latter plea replication was filed, and, by agreement, the cause was submitted to the court without a jury. The court found the issues for the plaintiffs, and the amount of their debt to be \$3602.55, with damages \$796.68, gave judgment accordingly, and that the debt be discharged upon payment of the damages. The defendants have brought the case to this court by appeal.

The bond sued upon was properly admitted in evidence. It was conditioned for the payment of the full sum of \$3602.55 within a year from its date. This suit was brought in August, 1869, more than ten years after the money payable by the condition of the bond, was due. This was a bond for the payment of money, and when introduced in evidence the plaintiffs established a *prima facie* case for the full amount as debt, and if interest, after maturity, was recoverable, that should have been allowed as damages. By the judgment rendered, the court found the whole amount payable by the condition, as debt, and \$796.68 as damages, and adjudged that the debt be discharged upon payment of that sum as damages. From the confused and unintelligible manner in which the record comes to us, and the case is presented by counsel, we are unable to discover any proper ground for the reduction of the

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sum of \$3602.55, payable by the express condition of the bond, down to the sum of \$796.68, which, under the form of the judgment given, must, when paid, be a satisfaction of the whole bond.

The appellees have not assigned errors, nor has the appellant assigned any as to the form of the judgment.

Upon the whole case, we think the result of the trial was far more favorable to the appellants than the evidence warrants. They, therefore, have no cause of complaint, and the judgment will be affirmed.

*Judgment affirmed.*

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HENRY T. HELM

v.

ELIZA CANTRELL *et al.*

1. *LIMITATIONS—new promise.* One partner executed a note in the name of the firm, after dissolution, and without the knowledge of the other partner, for a prior account due from the firm, and the note thus given was assigned by the payee to a third person, who was a mere volunteer, and without any assignment of the original indebtedness. In a suit by such assignee, against the representatives of the partner who did not concur in the making of the note, to compel its payment, it was *held*, that if the original debt became barred by the statute of limitations, as it would in five years, no new promise would revive and make it available in the hands of the plaintiff.

2. *SAME—effect of the note as against the partner who was not bound by it.* In such case, the original indebtedness being barred, the giving of a note therefor, in the name of the firm, by one of the partners alone, would not operate as a renewal or continuation of the debt as against the other partner, who was not bound by the note.

3. *ALLEGATIONS AND PROOFS—of the theory upon which a bill is framed.* Every fact essential to the plaintiff's title to maintain a bill and obtain the

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relief sought, must be stated in the bill, otherwise the defect will be fatal; for no facts are properly in issue unless charged in the bill, and of course no proof can be generally offered of facts not in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court pronounces its decree *secundum allegata et probata*.

4. So, where one of two partners executed a promissory note in the name of the firm, after the partnership was dissolved, for a pre-existing debt of the firm, but which had become barred by limitation, the other partner having no knowledge of the giving of the note at the time, upon bill filed by a subsequent holder, against the widow and heirs of the partner who did not participate in the making of the note, to subject real estate held by them to its payment, it was alleged that the note was made by the two members of the firm as partners, under the name and style of their firm. It was *held*, that under such an allegation it was not competent to prove that, although the deceased partner was not a partner at the time the note was given, yet he had subsequently ratified the act as shown by his admissions. To have rendered such admissions competent evidence, the bill should have disclosed the fact that they would be relied upon.

5. *SAME—as to the binding effect of a judgment.* And where the note in such case had been allowed by the county court, in a proceeding to which the administrator of the deceased partner was alone a party defendant, and the judgment thus obtained was treated in the bill as only *prima facie* evidence, it was held the complainant could not, upon the hearing, insist that it was conclusive upon the widow because she derived title to the land in controversy from the intestate, but must abide by the case made in his bill.

6. *EVIDENCE—conversations.* Witnesses should state facts, and not mere inferences or conclusions; and where a witness is testifying in respect to the alleged admissions of another, if he is unable to give the words, language, or the substance of it, he should not testify at all; the witness can not be permitted to give a mere conclusion of his own, when the conversation or declarations from which the conclusion is drawn, have passed from his mind.

7. *HEIRS—conclusiveness of judgment against an administrator.* Where a claim is allowed against an estate in a proceeding in which the administrator is alone a party defendant, while the judgment is conclusive as between the creditor and the administrator, it is not as to the heirs.

APPEAL from the Circuit Court of Logan county.

Messrs. HELM & HAWES, for the appellant.

Mr. WILLIAM B. JONES, for the appellees.

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Mr. JUSTICE MCALLISTER delivered the opinion of the Court :

This was a bill in chancery, in the nature of a creditor's bill, filed in the Logan county circuit court, on the 24th day of February, 1868, by Helm, the appellant, against the appellees, being the widow and children of James M. Cantrell, deceased.

The material allegations of the bill are, that, on the 26th day of September, 1856, George W. Rowell and said James M. Cantrell, being co-partners, under the firm name of George W. Rowell & Co., and as such, indebted to Wadsworth & Wells, merchants, in Chicago, in the sum of \$586.34, made their promissory note, under said firm name, for that amount, payable one day after date, with interest, to Wadsworth & Wells, which the latter, on the 16th day of October, 1861, assigned to Helm, which note had not been paid; that on the 27th day of April, 1866, said Cantrell died, leaving Eliza Cantrell and several children him surviving; that his estate is insolvent. At the April term, 1867, of the court of Logan county, Helm having filed said note as a claim against the estate, had it allowed for the sum of \$957.78 against Abner J. Lutes, administrator of Cantrell's estate, to be paid in due course of administration. The bill alleges that said note was the sole foundation of said judgment, which remained unpaid; that Cantrell was indebted to divers persons at and prior to his death, and was wholly insolvent. It is then alleged that, sometime after the making of the note, said Cantrell made a contract with the Illinois Central Railroad Company for the purchase of 160 acres of land situate in Logan county; went into possession and made many valuable improvements, and, before his death, had paid for one-half of the said 160 acres, and caused a deed to be made for such half, by the railroad company, to his wife; that he paid the whole purchase money for that half, and his wife no part of it; that, at the time of his death, he had paid a large part of the purchase money for

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the remaining half, but, a short time before his death, assigned the contract therefor to his wife; alleges that the land is worth sufficient to pay said judgment, and that the title of the wife is, as to appellant, fraudulent and void.

The bill calls for an answer upon oath, prays for a discovery, and that the land may be subject to said judgment.

The defendants answered, under oath, denying the execution of the note by James M. Cantrell, denying the existence of such indebtedness, or of any co-partnership at the time of the making of the note, setting up a dissolution of it six months before the note was made; denying that Cantrell had paid for the land as alleged, setting forth that said James M. had paid only a small portion of the purchase money; that a daughter, Eliza M. Cantrell, who had \$600 in her own right, had paid that sum on the half of the 160 acres which was conveyed to her mother, upon the express agreement that the same should be so conveyed, and that this should be deemed and regarded as an investment therein by her to that amount.

The answers denied all fraud in relation to the land; set up the statute of limitations against the indebtedness; laches, and averred that the widow had paid the principal part of the purchase money, with what was so paid by the daughter.

Replication was filed, and the cause heard upon the pleadings and proofs, and a decree was entered dismissing the bill; from which decree an appeal was taken to this court.

This case does not commend itself to the favorable consideration of a court of equity.

It appears, beyond controversy, that the firm of Rowell & Co., which existed during the years 1854, 1855, and a part of 1856, was, in fact, dissolved about the first of March, 1856, six months before the making of the note, and that the only transaction the firm ever had with Wadsworth & Wells was a purchase of goods made on the 26th of September, 1855, upon credit. It does not appear how long the credit was to be, or that any agreement was made for interest, or that any circumstances existed which would entitle Wadsworth & Wells to

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interest. The amount of that indebtedness, as shown by complainant below, was only \$558.42, yet, on the 26th of September, 1856, and six months after the dissolution of the firm of Rowell & Co., they obtain a note, made by Rowell, in the absence and without the knowledge or consent of Cantrell, but in the former firm name of Geo. W. Rowell & Co., for \$586.34, payable to the order of Wadsworth & Wells one day after date, with interest.

No efforts were made to reduce the original indebtedness to judgment, and on the 16th of October, 1861, the payees of the note assigned it to appellant, who, so far as the record shows, was a mere volunteer, and without any assignment of the original indebtedness. So that, if that debt became barred by the statute of limitations, as it would in five years, no new promise would revive and make it available in the hands of appellant. His title to maintain the bill depended, therefore, solely upon James M. Cantrell's liability upon that note. His allegations in that respect are, that Rowell & Cantrell, being co-partners, and, as such, indebted to Wadsworth & Wells in the amount of the note, made the same as partners, under the name and style of Geo. W. Rowell & Co. Upon this allegation issue was taken. The proof under it is all one way, that the indebtedness was not that included in the note, by nearly \$28, and the note was given by Rowell alone more than six months after the firm was dissolved. Then, without giving these defendants—the widow and children of the deceased person—any information by any averment, in either the stating or charging part of the bill, that the case was not as alleged, but that James M. Cantrell, though not a partner at the time, nevertheless made himself liable by ratification of the unauthorized act of making the note by Rowell, introduced proof of admissions by him to the agents of the payees, made six or seven years after the fact, and asked a decree accordingly. It is manifest that the facts necessary to establish a liability in the two modes are essentially different. Under the

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allegations of the bill, the proof of the existence of the partnership, the making of the note by a partner, for a partnership purpose, would suffice. If this was attempted to be done by admissions subsequent, the force of the admissions could be rebutted by proof of the actual facts. But under the substituted mode adopted, without any allegations or charges to inform the defendants of the issue they were to meet, to constitute ratification it would be necessary to show full knowledge by the principal, and a promise to pay.

In such a case, the principal being dead, a corrupt witness could, falsely, make the admission of the deceased cover the requirement of knowledge, and swear to a promise to pay, when there would be no possibility of rebuttal, and the widow and children be thereby robbed of home and support, without any previous notice by the bill that such a case would be attempted to be made against them. To prevent parties from being taken by surprise and entrapped, by witnesses swearing to confessions, conversations or admissions, it seems to be now established in England, that, if the bill means to rely upon any confessions, conversations or admissions of a defendant, either written or oral, as proof of any facts charged in the bill, the bill must expressly charge what they are, and to whom made; otherwise, no evidence thereof will be admitted at the hearing. Story Eq. Pl. 8th ed. sec. 265, and cases referred to in note 5. This rule has not been adopted in the courts of chancery of this country, although the reason of it affords strong ground for holding plaintiffs in equity, in such a case as this, to a full compliance with the general rules which do prevail, viz: that every fact essential to the plaintiff's title to maintain the bill and obtain the relief, must be stated in the bill, otherwise the defect will be fatal; for no facts are properly in issue unless charged in the bill, and of course no proof can be generally offered of facts not in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court pronounces its decree *secundum allegata et probata*.

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The reason of this is, that the defendant may be apprised by the bill what the suggestions and allegations are against which he is to prepare his defense. Story Eq. Pl. sec. 257; 1 Dan. Ch. Pr. 377; *Fitzpatrick v. Beatty*, 1 Gilm. 455; *Primmer v. Patten*, 32 Ill. 528; *Brainard v. Arnold*, 27 Conn. 617; *Bailey v. Ryder*, 10 N. Y. 363; *Crockett v. Lee*, 7 Wheat. 522; *Jackson v. Ashton*, 11 Peters; *James v. McKernon*, 6 Johns. 564.

The reason of the rules referred to required the complainant in this case to have either set out the manner in which the alleged liability of James M. Cantrell accrued upon a note not signed by him in person, or purporting to be signed by him as agent, either in the stating part of the bill or in the charging part, by way of anticipation of the defense arising upon the facts of its origin, and should have distinctly averred a ratification of the unauthorized act, with full knowledge of material circumstances by Cantrell. Then the issue, which was sought to be made by evidence alone, would have been properly made by the pleadings. This was necessary to apprise the defendants, by the bill, of the precise case they would be called upon to meet. There is no hardship in this, because the matters of the alleged ratification were peculiarly within the knowledge of Wadsworth & Wells and appellant, and were unknown to defendants. Any attempt to divest a family of their property by the admissions of the deceased husband and father, sworn to long after the event of making them, is of a most dangerous character, and should be carefully watched. This case affords a strong example. Two witnesses are sworn, who pretend that they, respectively, had conversation with the deceased, but not when both were present. One of them says that he saw Cantrell about the debt of \$558.42, which was the original debt, sometime after the note was made; went to try to collect the debt; that Cantrell claimed poverty, that his lands were not paid for; that if he ever got able he would pay the debt. The witness does not pretend that he had the note with him, and it is apparent that the conversation related to the original indebtedness, which is not in question in this suit.



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The only other witness upon the question of ratification was Edward C. Austin, a traveling agent for Wadsworth & Wells, in 1857, and to 1861. He says he never saw Cantrell but once; can not state *when* it was, except that it was while he was in the employ of Wadsworth & Wells. He had in his hands a note for his employees, against Geo. W. Rowell & Co., of Atlanta; could not state the amount, but it was over \$500. He went with this note to Atlanta; there learned that Rowell had left the country, and that James M. Cantrell had been his partner; then went seven or eight miles into the country, and saw Cantrell; found him on his farm. Cantrell claimed that he had bought the farm of the Illinois Central Railroad Company, but had not paid for it, and was poor. Witness says he showed Cantrell the note, and told him witness's business. Cantrell said that if he ever got able to pay the *debt* he would pay it; that he had already had to pay a good deal of money for the concern; that Rowell was a scamp and had cleared out. Witness asked him who the "Co." of the concern was. He said that *he* had been. *He fully admitted his liability on the note.* Witness said he made a memorandum on the note at the time, but did not then remember what it was.

This testimony was taken some eight years after the alleged conversation, by deposition. The note was not present when it was taken. The note, when produced at the hearing, had a memorandum, in pencil, on the back of it, which appellant testified was in the handwriting of this witness, but there is not one word in it about Cantrell admitting his liability upon it. After this long lapse of time, the witness does not pretend to give either the conversation or the substance of it, in the language of Cantrell, but forecloses the whole subject by saying, "he fully admitted his liability on the note." How did he admit it? What language did he employ? What was the conversation in this respect? As to that, we are left wholly in the dark. The statement is a mere conclusion. Witnesses should state facts, and not mere inferences or conclusions. If the witness was unable to give the words, language, or the

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substance of it, as used by Cantrell, he could not testify at all ; he can not be permitted to give a mere conclusion of his own, when the conversation or declarations from which the conclusion is drawn, have passed from his mind.

The answers of the defendants, and the evidence introduced on their behalf, overcame the case made by appellant in his bill, but he insists, on this appeal, that he was entitled to a decree upon the evidence of ratification, to which we have referred. There was no allegation in the bill with which such proof corresponded. He alleged that Cantrell made the note as co-partner with Rowell. This is completely disproved by showing that Rowell made it alone six months after the firm was dissolved. Then complainant, without any such case made by his bill, sought to show that, notwithstanding the note was made by Rowell six months after the firm was dissolved, still, Cantrell, years afterwards, ratified this unauthorized act. Such proof was inadmissible under the allegations of the bill. But even if it had been, we are unwilling to take the mere conclusion of the witness for the basis of a decree for the divestiture of title to real estate.

This case was tried solely upon the theory that Cantrell was bound by the note, and that the transfer of the land contract by him to his wife was fraudulent and void as to complainant, the holder of the note. No other indebtedness subsisting against Cantrell at the time of the transfer was proved or relied upon.

The original indebtedness from Rowell & Co. to Wadsworth & Wells was barred by the statute of limitations, and if the note in question was not binding upon Cantrell, it constituted no renewal or continuation of that indebtedness as against him. The case, therefore, hinges upon the question whether, at the time of the transfer of the land contract to Eliza Cantrell, that note constituted a valid subsisting indebtedness or liability against James M. Cantrell. Under the allegations and proofs in the cause, we are bound to hold that it did not.

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If the note in fact constituted no liability against Cantrell at the time of the transfer to his wife, and was never afterwards made such by any act on his part, we are of opinion that the allowance of the note by the county court, years afterwards, upon notice only to the administrator, can not have the effect to give it a retroactive validity, so as to affect that transfer. Such a result could be produced only by the operation of the doctrine of estoppel, and not by that. None of the defendants to this suit were parties to that judgment, except Lutes, the administrator. It is conclusive between creditor and administrator, but not as to the heirs. *Stone et al. v. Wood*, 16 Ill. 177.

Whether or not the widow was estopped by it, is a question not presented by this record. The bill is framed upon no such theory. By it the complainant invited and entered into the contest in reference to a simple contract indebtedness against James M. Cantrell, at the time of the transfer of the land contract.

Upon the issue thus made, the evidence strongly preponderates against the complainant, and he can not be permitted now to turn around and say, I insist that the judgment of the county court is conclusive upon the widow, because she derived title from the intestate.

If the bill had relied upon the judgment as conclusive, *non constat*, but she would have attacked it for want of jurisdiction, or for fraud. The bill plainly treats that judgment as only *prima facie* evidence, and appellant must stand by the case so made.

We are of opinion that the circuit court decided correctly, and its decree is affirmed.

*Decree affirmed.*

## THE CHICAGO, BURLINGTON &amp; QUINCY RAILROAD CO.

v.

THOMAS PAYNE, Administrator of

ALBERT Y. PAYNE, Deceased.

1. *NEGLIGENCE—of contributory negligence.* The doctrine, that any contributory negligence by the party injured, no matter how slight when compared with that of the defendant, will defeat a recovery in an action for damages resulting from the negligence of the defendant, has often been repudiated by this court. The rule is, that negligence, resulting in injury, is comparative, and it is not required that the plaintiff shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if it appear the defendant was guilty of a higher degree of negligence.

2. *SAME—what constitutes.* In an action against a railroad company to recover damages for injuries occasioned by the alleged negligence of the defendant's servants in the manner of running its trains, it appeared the accident occurred at a road crossing, near a populous city, the party injured attempting to cross the railway track in a buggy which was struck by the passing train. The crossing was of a dangerous character, and there was evidence sufficient for the jury to find that the servants of the company having the control of the particular train which did the injury, were well aware of that fact. It was *held*, if this were so, and there was evidence tending to show that they ran the train without the use of steam, upon a down grade, in a comparatively noiseless manner, and at a rapid rate of speed, without sounding the whistle or ringing the bell after they passed the whistle post, 80 rods from the crossing, when they had every reason to suppose that persons would be passing over the track on the highway, without opportunity of seeing the approaching train, then these facts were sufficient to warrant the jury in inferring recklessness of life and limb on the part of such servants, and that they were actuated by general malice and criminal misconduct, or very gross negligence.

3. *RAILROADS—of their duty as to the safety of road crossings.* A railroad company is under the statutory duty, in the construction of its road across a public highway, to restore the highway to its former state, or in a sufficient manner not to impair its usefulness. And if a highway can be restored in a manner not to impair its usefulness only by constructing the highway over the railway, it is the duty of the company to so restore it, and the omission is a breach of duty.

4. It is not the duty of the highway authorities, but of the railway company, to give such protection from peril caused by the railway at highway crossings.

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| 59  | 534 |
| 23a | 502 |
| 59  | 534 |
| 88a | 108 |
| 59  | 534 |
| 133 | 642 |
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| 143 | 59  |
| 59  | 534 |
| 153 | 100 |
| 59  | 534 |
| 51a | 406 |
| 59  | 534 |
| 157 | 306 |
| 59  | 534 |
| 86a | 442 |
| 59  | 534 |
| 173 | 74  |
| 59  | 534 |
| 78a | 470 |
| 59  | 534 |
| 84a | 157 |
| 59  | 534 |
| 182 | 14  |
| 59  | 534 |
| 192 | 26  |

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5. *INSTRUCTION*—*need not set forth every element of the case.* In such an action, it is not an unusual, nor is it an objectionable, practice, where the plaintiff's counsel desires an instruction as to the rule of damages, to say to the jury that, if they find from the evidence that the defendant is guilty, as charged in the declaration, then the plaintiff is entitled to recover, and to define the measure of damages.

6. Such a mode obviates the necessity of stating, and perhaps reiterating, hypothetically, each element of the cause of action, before coming to the real point in the instruction.

7. *SAME*—*taking a case from the jury.* An instruction is properly refused which purports to take the case, when there is a conflict of testimony, away from the jury, by telling them how to find their verdict.

APPEAL from the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. BROWNING & BUSHNELL, for the appellant.

Messrs. SKINNER & MARSH, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Adams circuit court, rendered in an action brought under the act of 1853, by appellee, as administrator of Albert Y. Payne, deceased, against appellant, to recover, for the benefit of the next of kin of deceased, the damages resulting from his death, which was caused, as it is alleged, by the wrongful acts, neglect and default of appellant's servants.

The general grounds relied upon for reversal are: 1st, error in overruling appellant's motion for a new trial; 2d, error both as to giving and refusing instructions.

The first of these grounds is narrowed down, by the argument of appellant's counsel, to a single point, though that is presented in a double aspect, viz: that, by the uncontradicted evidence, or the clear weight and preponderance of evidence, the deceased was himself guilty of *gross*, or at least *some*, contributory negligence, and in either case there could be no recovery.

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The doctrine, that any contributory negligence by the party injured, no matter how slight when compared with that of the defendant, will defeat a recovery, has been repeatedly repudiated by this court, and in no case more directly than in this, when previously before us, on appeal from a former judgment. *C., B. & Q. R. R. Co. v. Payne*, 49 Ill. 499.

But the questions remain to be considered under the first head of appellant's argument: Was the deceased guilty of the gross negligence imputed to him by counsel? And should the new trial have been granted?

In seeking a solution of these questions, we find, from the voluminous evidence in the case, and the contrariety of its tendency, that, notwithstanding the effort of appellant's counsel to narrow the question down to a single phase, as though it rested upon the uncontradicted testimony of credible witnesses, we must, nevertheless, pursue the inquiry upon the broad proposition, whether the verdict is so clearly and manifestly against the weight and preponderance of the evidence on the whole case, as that we should reverse for that reason. To consider the question of negligence on the part of deceased apart and isolated from its relation to that of appellant's servants, is to disregard the very spirit of the rule by which such cases must be governed. See *Galena & Chicago Union Railroad Co. v. Jacobs*, 20 Ill. 478, for the rule of this court, and which it has been the intention to adhere to throughout the subsequent decisions.

The injury occurred just at evening on the 14th day of July, 1866, about two and a half miles from the city of Quincy, at a point where a common public road, leading from Quincy to Warsaw, in a northeast direction, is crossed by appellant's railroad. At this point, which is commonly known as the "Warsaw Crossing," the highway runs due north and south, and the railroad almost due east and west, so that they cross each other nearly at right angles. The crossing is in a hollow between two hills—that on the north being called Col. Jamison's Hill, and the one on the south the Streeter Hill. The top of the Streeter hill is about 31 feet higher than the crossing,

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the distance being about 480 feet from the top of the hill to the crossing. Down this hill the highway runs in a cut varying from about 3 feet to 7 feet in depth, with an ordinary rail fence some 4 or 5 feet high on top of the embankment on the east side down to the crossing. The highway is 16 feet wide down to the crossing, and *there* it is only 12 feet wide, with a culvert on each side of it. East of the crossing the railroad itself runs in a cut, which is upwards of 7 feet deep at the crossing, upwards of 10 feet deep 150 feet east of it, and from that point it gradually lessens in depth until, at the distance of about 465 feet, it runs out upon the natural surface. About 80 rods east of the crossing was the ordinary whistle post, and there was no sign board at or near the crossing, as required by statute. From Cliola station, about five and a half miles east of the crossing, all the way to Quincy, there is an easy down grade, so that trains run from Cliola to Quincy without the use of steam, and at a rate of speed varying from fifteen to twenty-five miles per hour.

Such, substantially, was the relative situation of the Warsaw road and the railroad, when young Payne, the deceased, then being between nineteen and twenty years of age, with a steady horse attached to a top buggy, with two lads, William H. Jones and Charles Letton, riding with him, came down the Streeter hill, from the south, and approached the crossing. Just before them a man of the name of Donohue was driving, on a slow trot, with a buggy and a lady in it, and hearing or seeing no train, he passed over the track, and had gone the distance of only 15 or 20 feet over it when a freight train of appellant, from the east, passed the crossing at a fast rate of speed, and went on without stopping. Payne's horse was seen running back up the Streeter hill with nothing but the shafts of the buggy attached. The buggy was dashed into pieces, the fragments lying south of track. Payne and Jones were lying south of track on the west cattle guard. The latter was killed outright. Payne was breathing, but had one leg smashed, bone broken and flesh mangled. He died soon after.

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Letton was badly injured, but survived. From the description given of the accident by Long, who was upon a load of hay on the Jamison hill north, and going south towards the crossing, and having full view of the whole scene, the horse Payne was driving must have reached the railroad track as the train came on to the crossing, and then by suddenly whirling around in the narrow space of 12 feet between the cattle guards, so violently cramped the buggy as to tip and throw it against the corner of some of the passing cars. Long saw the boys, over the engine or between the cars, throw up their hands, and immediately saw the horse running back up the Streeter hill. This witness could see the train from his position, but could hear no bell or whistle or other sound than the mere rumbling of cars; is quite positive that the boys were not driving fast, and from their position, with relation to Donohue, it is very probable that they were not.

The testimony relied upon by appellant's counsel, as showing negligence on the part of deceased, is the deposition of one Truman Streeter, taken in the State of Missouri. He testifies, in substance, that at the time in question he had started to go south to Quincy, and when about three rods south of the Streeter hill, the boys passed him going north in a top buggy, the top being up, and, he says, the lines hooked up in the top; that the horse was going on a fast trot; the boys laughing and "cutting up, and seemed to be having a good time;" that he spoke to Jones, the only one of them he knew; that Jones turned his head and said "Now we go." Just then witness heard the bell ring on the freight train; he could see the train; there was a space right then, he said, of two or three rods through which the train could, at a certain point, be seen. He saw it at whistle post at that time, and halloed to the boys that the train was coming, and to look out. He did not think they heard him. He kept right on south, and when he had gone only three or four rods, saw the horse come running over the hill with the shafts attached to him.



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A critical examination of the evidence shows that the testimony of this witness is in direct conflict with the circumstances detailed by Long and Donohue, who were directly on the spot, or in full view of the accident.

The story of Truman Streeter is of so improbable a character, so much against the instincts of human nature and the presumptions arising therefrom, as to require the most reliable evidence of its truth, before it could receive the credence of a sensible jury.

Payne, the counsel say, was familiar with the place. But he was a young man between nineteen and twenty years of age; was shown to possess good ordinary abilities, and to be of good habits. The crossing was at the foot of a steep hill, was only 12 feet wide, with culverts, or cattle guards, on either side. It is even assumed that they saw the train coming, or had ample warning of its approach; that, nevertheless, with lines out of reach, fastened at the top of the buggy, and with a shout "Now we go," they went "dashing down the hill," in the language of counsel, "and ran into the train." This could not be true as to a person of Payne's age, discretion and ability, without imputing to him a motive of self-destruction, and a majority of the court are of the opinion that the jury were warranted in finding against this theory, upon the whole evidence before them.

The fair deduction from the evidence is, that Payne's buggy followed close upon Donohue, who had got only 15 or 20 feet over the track when the train came along. It is also a fair conclusion from the evidence that, though the bell may have been rung at or a little east of the whistle post, yet, that as the train approached the crossing from the post, no bell was rung or whistle sounded. Donohue heard none. Long, who was near to the scene and an eye-witness of the accident in its main features, testifies that the bell was not rung or the whistle sounded, that no steam was used and all the sound heard was the rumbling which cars would naturally make in running at a fast rate of speed upon a down grade without

steam. Various other witnesses testify the same way. It may be, and probably is, true, that deceased, following after Donohue's buggy, did not stop as he approached the crossing, to either look or listen. This may have been negligence, but whether it was such as should defeat the recovery, was for the jury to determine, upon its comparison with that of appellant's servants.

This crossing, when considered with all the circumstances of the situation of the highway and railroad, must have been deemed by the jury to have been of a most dangerous character. No man of ordinary sense could consider its circumstances without arriving at that conclusion. The company was under the statutory duty to restore the highway to its former state, or in a sufficient manner not to impair its usefulness. Stat. 1849, p. 24. The peril of the crossing could have been avoided by the railway going under the highway, or, in other words, constructing the highway over the railway. If the highway could be restored in a manner not to impair its usefulness only in that way, it was the duty of the company to so restore it, and the omission was a breach of duty. It failed in its statutory obligation. It was not the duty of the highway authorities, but of the railroad company, to give this protection from the peril caused by the railroad.

The circumstances were all before the jury. The crossing was only two miles and a half from a populous city; was upon an old, much traveled highway, which was situated, with reference to the intersection of the railroad, as before detailed. Persons driving north upon the highway, and especially at that time of year, had very little, if any, opportunity of seeing a train approaching from the east, by the use of particular caution. By reason of the descending grade, trains came gliding down through the cut east of the crossing without the use of steam, and almost noiselessly, except a rumbling sound which could be heard with difficulty by one driving or riding in a vehicle upon the highway, so that the traveler on the highway was subject to imminent peril, and was almost wholly dependent

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upon the servants of the company performing the statutory duty of ringing the bell or sounding the whistle, for any warning against that peril.

The company is chargeable with notice of all the perilous circumstances of a crossing constructed by itself. There was no sign board there to give warning, as required by statute. There was evidence sufficient for the jury to find that the servants of the company having the control of the particular train that did the injury were well aware of the dangerous character of the crossing. If this were so, and there is evidence tending to show that they ran the train without the use of steam down this grade in a comparatively noiseless manner and at a rapid rate of speed, without sounding the whistle or ringing the bell after they passed the whistle post, 80 rods east of the crossing, when they had every reason to suppose that persons would be passing over the track on the highway without opportunity of seeing the approaching train, then these facts were sufficient to warrant the jury in inferring recklessness of life and limb on the part of such servants, and that they were actuated by general malice and criminal misconduct, or very gross negligence.

It is the opinion of a majority of the court, that there was evidence strongly tending in that direction, and that the verdict of the jury so finding, and that the negligence of the deceased was slight when compared with that of the company and its servants, and that the negligence of the latter was gross, is not so against the clear weight and preponderance of the evidence as to justify this court in disturbing it.

The only instruction given on behalf of appellee, which is complained of, is the fifth, and is as follows:

“If the jury should find from the evidence that the defendant is guilty of the wrongful act, neglect or default, as charged in the plaintiff’s declaration, and that the same resulted in the death of Albert Y. Payne, then the plaintiff is entitled to recover in this action, for the benefit of the next of kin of such deceased, such damages as the jury may deem, from the

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Opinion of the Court.

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evidence and proofs, a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to such next of kin, not exceeding \$5000."

The point of this instruction is the measure of damages, and in this respect is entirely correct. But appellant's counsel insists that it is wrong because it withdraws from the jury all consideration of the conduct of deceased.

We do not think the instruction obnoxious to criticism, as claimed. It is not an unusual, nor is it an objectionable, practice, where plaintiff's counsel desire an instruction as to the rule of damages, to say to the jury that, if they find from the evidence that the defendant is guilty, as charged in the declaration, then the plaintiff is entitled to recover, and to define the measure of damages. Such a mode obviates the necessity of stating, and perhaps reiterating, hypothetically, each element of the cause of action, before coming to the real point of the instruction.

The declaration here alleges that the death of Albert Y. Payne was caused by the wrongful acts, neglect and default of defendant's servants, while he was exercising due care.

The thirteenth instruction asked for on behalf of appellant was properly refused, because it purported to take the case, when there was a conflict of testimony, away from the jury, by telling them that no evidence had been given to the jury on the trial, tending to show that the deceased, Albert Y. Payne, took any precaution, or used any care or diligence, to avoid the accident, and that it was their duty, in view of all the evidence in the case, to find a verdict for the defendant.

All of the other instructions asked on behalf of the defendant, and refused, were substantially embraced in those which were given. We think the law was laid down most favorably for the defendant, and to the fullest extent to which it was entitled.

It is the opinion of a majority of the court that there is no substantial error in this record, and that the judgment of the court below should be affirmed.

*Judgment affirmed.*

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3. *Where offense charged is assault and battery.* Where it is sought to recover such a penalty, the fact that the offense charged is assault and battery, does not change the character of the proceeding. The town only acquires jurisdiction because the offense is prohibited by ordinance. *Ibid.* 137.

AS TO THE USE OF ONE'S OWN PROPERTY.

4. *To the injury of the property of another.* In an action to recover for injury to the plaintiff's dwelling house, resulting from dust, etc., thrown thereon from the defendant's flouring mill, it is not error to

**ACTIONS. AS TO THE USE OF ONE'S OWN PROPERTY. *Continued.***

instruct, for the defendant, that a man has the right to erect a mill in a proper place, and to run and use it in a proper manner, and that it is not the policy of the law to hamper and retard, but to foster, such property in its proper and legitimate use; and that if the mill was in a proper place, used and operated in a proper manner, without material injury to plaintiff's reversionary interest, then the jury should find for the defendant. *Cooper v. Randall et al.* 317.

5. Nor is it error, in such case, to instruct that the law does not give damages for every inconvenience or interruption of the rights of another. That there are annoyances which, by the nature and condition of society, must accrue to property of individuals, which do not in themselves create a legal liability. But the injury for which the law gives damages must be real, and not imaginary, and not whimsical; it must be real, and not simply inconvenience or trifling interruption. *Ibid.* 317.

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1. *Liability thereon.* An administrator, after having given the usual bond required, gave a second or additional bond, not, however, on the application of the sureties in the first bond, under the 79th section of the statute, but to furnish security for his official conduct satisfactory to the probate court. The second bond did not, by its terms, relate back to the granting of the administration. Its conditions were identical with those of an ordinary administrator's bond, except that, after describing the principal in the bond, as administrator of the "goods and chattels, rights and credits" of the deceased, he is required to make an inventory merely of the "rights and credits" which should come to his hands, leaving out the words "goods and chattels." The effect of this was that when, in a subsequent part of the conditions of the bond, the administrator was required to deliver and pay over to

## ADMINISTRATION OF ESTATES.

OF A SECOND OR ADDITIONAL ADMINISTRATOR'S BOND. *Continued.*

the persons entitled thereto, "all the rest of said goods and chattels," the words "said goods and chattels" should be referred to all the goods and chattels which had come to the hands of the administrator, and not merely to those coming to his hands after the giving of the bond. *Pinkstaff et al. v. The People, use, etc.*, 148.

2. If the more specific conditions in the bond would not be sufficient, the general one that he was to "do and perform all other acts which may be at any time required of him by law," would require him to pay over to the guardian whatever might be due the heirs. *Ibid.* 148.

3. So, where the administrator had misapplied the funds of the estate before the second bond was given, by appropriating them to his own use, the sureties on such bond would be liable to the guardian of the heirs for such portion of the money as he was entitled to in that capacity; and this, even if the sureties were only liable for breaches occurring after its execution, because the gravamen of the action would be, not the prior misapplication, but the failure to pay over. *Ibid.* 148.

4. Nor is it necessary, in such case, that the first bond should be exhausted, before resort could be had to the second. The first bond continued in force, and was as obligatory upon its makers as if the second had never been given; but a creditor, or other person interested in the estate, has his election upon which to sue, if the mal-administration for which suit is brought, would be a breach of both bonds. *Ibid.* 148.

## GIVING AN ADDITIONAL BOND.

5. *By an administrator—effect thereof as to sureties on the original bond.* See SURETIES, 6.

## TWO YEARS LIMITATION.

6. *Of the judgment.* Where a claim against an estate was not filed until after the expiration of two years from granting the letters, the judgment therefor can only be paid out of subsequently discovered assets, and which had not been inventoried and accounted for; and in that regard, the judgment should be special, and not general. *Russell v. Hubbard et al.* 335.

## EXTENT OF RECOVERY.

7. *Can not exceed the account filed.* Where a party presents an account against an estate, he is limited in his recovery by the amount claimed, as much as a plaintiff is by the *ad damnum* in his declaration. *Ibid.* 335.

ADMINISTRATION OF ESTATES. *Continued.*

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1. *Construction of a particular contract.* A entered into a written agreement with B, by which the former was constituted the agent of the latter for the sale of certain machines. The only provision in regard to the duration of the agency was as follows: Said B, in consideration of the faithful performance, by the said A, of the obligations by him hereinafter assumed, agrees to furnish the said A such number of machines as the said A may be able to sell, as his agent, prior to October 1st, 1867: *Held*, by a reasonable construction of the agreement, the agency continued only until the 1st of October, 1867, and the sureties on a bond, executed by A, to secure the faithful performance of his duties as such agent, conditioned that he would justly and fairly account for and pay over all moneys, notes, etc., received by him for such machines as might come to his hands as such agent, were bound only for a failure on the part of A to account for machines received by him prior to that date. *Gundlach et al. v. Fisher et al.* 172.

## AUTHORITY OF SPECIAL AGENT.

2. *How far he may bind his principal.* A special agent's authority is that which is given by the terms of his appointment, or that with which he is apparently clothed by the character in which he is held out to the world, although not strictly within his commission, and whatever is done under an authority thus manifested, is within the



**AGENCY. AUTHORITY OF A SPECIAL AGENT. *Continued.***

authority, and the principal is bound for that reason. He is equally bound by the authority which he actually gives, and by that which by his own acts he appears to give. The principal is responsible for the appearance of authority. *Smith v. Board of Supervisors of Peoria County*, 412.

8. When one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss, must sustain it. *Ibid.* 412.

4. Although an agent's authority may be special and limited, yet, if the principal permits such agent to advertise his name as agent generally, without noting such limitation, and the agent acts outside of his authority, the principal will be bound thereby, unless the party with whom he deals had notice of the limitation. *St. Louis & Memphis Packet Co. v. Parker*, 28.

**RATIFICATION BY PRINCIPAL.**

5. Although the act of an agent, outside of the scope of such agent's authority, is not binding upon his principal, yet the principal may ratify such act and thus render it obligatory upon him. *Ibid.* 28.

**WARRANTY BY AN AGENT.**

6. *Whether the principal is bound.* An agent, acting under a general authority from his principal to make the sale, sold to another two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase money: *Held*, the principal was bound by any warranty of the agent, to the purchaser, in regard to the soundness of the mules. *Cochran v. Chitwood et al.* 53.

**AGENT MUST ACCOUNT FOR PROFITS.**

7. An agent must not put himself, during the continuance of his agency, in a position adverse to that of his principal. To the latter belongs the exercise of all the skill, ability and industry of the agent. *Cotton v. Holliday*, 176.

8. If a party employ an agent to make a purchase of land, he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price which the agent pays. The agent can not avail himself of any advantage his position may give, to speculate off his principal. All the profits or advantages gained in the transaction belong to the principal. An agent is not permitted, without the assent of his principal, to acquire an interest in the subject matter of the agency, adverse to that of his principal. *Ibid.* 176.

9. If an agent make any profits in the case of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal. *Ibid.* 176.

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## WHEN ONE IS AGENT OF BOTH PARTIES.

10. *Liability when acting as agent for both buyer and seller, and of the rights of the buyer in such case.* While a person can not properly be the agent of both parties, buyer and seller, yet if he accepts the position of agent for the buyer, without disclosing the fact that he is agent for the seller, he can not afterwards repudiate such position to shield himself from liability to the buyer, on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer, he must be held to a strict performance of the duties, and to all the liabilities the relation imposes. *Cottom v. Holliday*, 176.

11. Though the buyer may, in a proper case, repudiate the acts of the agent, upon the ground that he was the agent of the seller, and did not disclose the fact. *Ibid.* 176.

## PRINCIPAL AND SURETY.

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## AMENDMENTS.

## AMENDMENT OF DECREE IN CHANCERY.

1. *Within what time it may be made.* Generally, after the lapse of the term at which a final decree is entered in a chancery proceeding, alterations or amendments thereto, upon motion, are not allowed. *Lilly et al. v. Shaw et al.* 72.

2. The exceptions to this rule are substantially the same as in cases of judgments at law, and are confined to mere clerical errors, or of form, or in respect to matters quite of course. *Ibid.* 72.

3. *As to taxing attorney's fees as costs.* So, in a proceeding by bill in chancery for the assignment of dower in certain premises, and for partition thereof, after final decree, covering the entire subject matter of the suit, and the question of costs, determining the proportion each party was to pay, it was *held* incompetent for the court, upon motion at a subsequent term, to so alter the decree as to make an allowance for the fees of counsel, authorized by the act of 1869 to be taxed as costs in suits for partition where the proceedings are amicable. *Ibid.* 72.

**AMENDMENTS. Continued.****MAKING NEW PARTIES IN CHANCERY.**

4. *Necessity of amending bill for that purpose.* See **PARTIES**, 2, 3.

**AMENDMENT OF APPEAL BOND.**

5. If the appeal bond given on an appeal from the judgment of a justice of the peace in a suit to recover the penalty for a violation of a town ordinance, should be found to be defective, it is the duty of the circuit court to allow amendments, as in civil cases. *Hoyer et al. v. Town of Mascoutah*, 187.

**APPEALS.****FROM A JUDGMENT IN RESPECT TO A PENALTY.**

1. An appeal from the judgment of a justice of the peace in a suit to recover a penalty for the violation of a town ordinance, must be allowed and perfected under the provisions of the statute allowing appeals in civil cases. *Ibid.* 187.

**APPEALS FROM JUSTICE OF THE PEACE.**

2. *By one of two defendants.* One of two defendants against whom a judgment had been rendered, in a justice's court, took an appeal therefrom to the circuit court, and without any summons having been issued to bring in the other defendant, or his appearance having been entered, the circuit court at the next term thereof, after such appeal was perfected, upon the motion of the party who recovered the judgment, dismissed the appeal with a procedendo and rendered judgment against both defendants "for damages in the delay in taking said appeal" and for costs: *Held*, that this was error, the circuit court having no jurisdiction, under the statute, to render judgment against the defendant not joining in the appeal, without summons issued against him, notifying him of such appeal and requiring him to appear, etc., to be served as other process issued in appeal cases, and if the summons be returned not found, the cause, at the first term, to stand continued, but at the second term shall be tried—when the court would have power to render the same judgment as though both defendants had joined in the appeal. *Walter et al. v. Bierman*, 186.

**FROM COUNTY COURTS, IN RESPECT TO ROADS.**

3. *Whether appeal will lie.* In counties not under township organization, the county courts have the discretionary power to locate and establish public roads. They are made the judges of the public necessity of such roads, and this discretion, when once exercised, is not subject to review by the circuit court. The statute gives no appeal from such cases except upon a final order directing the road to be opened after the damages have been assessed. *Roosa v. Henderson County*, 446.

APPEALS. FROM COUNTY COURTS, IN RESPECT TO ROADS. *Continued.*

4. *Of the hearing in the circuit court.* On the coming in of the report of the commissioners, of the assessment of damages and its confirmation, and the final order for the opening of the road, the statute gives the party the right to appeal to the circuit court, where, on the hearing in that court, the regularity of the proceedings in the county court may be questioned, as well as the assessment of damages. If such proceedings are irregular they will be reversed, and the county court will proceed *de novo*; but if correct, then the question to be tried on the appeal is, as to the damages. *Roosa v. Henderson County*, 446.

5. Where a party appeals from the final order approving the report of damages sustained by property owners, the party may introduce any legitimate evidence to show the extent of such damages. But where an appeal is prayed and perfected in such case, before the damages are assessed and the road ordered to be opened, the appeal is premature, and the circuit court has no jurisdiction, original or appellate, in such a case, to hear evidence and assess damages. *Ibid.* 446.

6. *Appeal prematurely taken—effect of judgment.* Where an appeal in such a case is thus taken, when none is given or allowed, and the circuit court proceeds to try the case, and judgment is rendered against the party appealing, for costs, the judgment would constitute no bar to his rights in the premises, and such judgment may be regarded as, in effect, but a dismissal of the appeal. *Ibid.* 446.

APPEALS AND WRITS OF ERROR.

WRIT OF ERROR TO A COUNTY COURT.

*Whether it will lie.* A writ of error will not lie from this court to a county court to bring in review an order of that court removing a party from his office of administrator of an estate, and requiring him to pay over a sum of money found to be due the estate. *Fraus v. The People*, 427.

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FOR RIGHT OF WAY FOR A RAILROAD.

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ASSESSMENTS, SPECIAL. See SPECIAL ASSESSMENTS.

## ASSIGNMENT.

## PROOF OF ASSIGNMENT—WHETHER NECESSARY.

1. *At the common law.* At the common law, in an action on a promissory note by an assignee thereof against the maker, the plaintiff is required to prove that the indorsement was made by the person by whom it purports to have been made, and where the indorsement is special, that the indorsee is the person described in it. *Hall v. Freeman*, 55.

2. *Mode of proof.* Though, when the handwriting of the indorser is proved, possession of the note might be *prima facie* evidence of ownership. *Ibid.* 55.

3. *Under the statute.* The 59th section of the Practice Act (R. S. 421), which declares that, "in actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignment or the signature of any assignor, unless the fact of assignment be put in issue by plea, verified by the affidavit of the defendant, or some credible person, stating that he believes the facts stated in the plea are true," does not apply, unless the plaintiff declares specially upon the instrument. *Ibid.* 55.

## INJUNCTION BOND.

4. An injunction bond is not assignable at law. *Safford v. Miller et al.* 205.

## COVENANT AGAINST INCUMBRANCES.

5. *May be sued upon by a remote grantee.* See COVENANTS FOR TITLE, 1.

## ASSUMPSIT.

## WHETHER THE ACTION WILL LIE.

*Remedy where one purchases land and another takes the title.* If a person purchases land, and another takes the title in his own name, the real owner, it may be, may have a claim in equity to recover the land, but the nature of the claim in that regard can not be investigated in an action of assumpsit. *Broughton v. Smart*, 440.

## ATTACHMENT.

## WHETHER IT WILL LIE.

*Upon a judgment in the same court.* A suit by attachment will lie upon a judgment recovered in the same court in which the suit is brought, and this although the plaintiff is entitled to execution upon the judgment at the time of issuing the writ. An indebtedness upon a judgment comes clearly within the meaning of the first section of the attachment act. *Young v. Cooper et al.* 121.

## ATTORNEY AT LAW.

## ATTORNEY AND CLIENT.

1. *Of their relations in respect to a redemption advised by the attorney.*

A judgment debtor, whose land had been sold under execution, was induced to allow the time prescribed by the statute for him to redeem, to pass without making redemption, on the promise of another that he would aid him in redeeming after the twelve months expired, through a judgment creditor. Accordingly, before the time for redemption by a judgment creditor had expired, the debtor confessed a judgment in favor of the party thus promising to aid him, and of another, an attorney at law, who had advised the same course, for the purpose of such redemption, and these judgment creditors redeemed the premises from the original sale, and the attorney, having purchased the interest of the other, obtained a sheriff's deed, and refused to permit the debtor to redeem from him: *Held*, upon bill filed for that purpose, the debtor, under the circumstances, was entitled to redeem from the party who had thus acquired the title. Having lost his right to redeem under the statute by reason of the promise of assistance, the party making that promise could not be allowed to disappoint the expectation he had created in the debtor's mind that the redemption should be for his benefit. Nor could the attorney, who had participated in the redemption, and finally obtained the title, stand in any different attitude towards the debtor, for while he made no promise of aid in respect to a redemption by a judgment creditor, he advised the debtor, when consulted by him on the subject, not to redeem as a judgment debtor, but to make redemption after the twelve months, in the other mode. The relation of the attorney, in that capacity, to the transaction, would prevent him from holding the land as against his client. *Trotter v. Smith et al.* 240.

2. Moreover, if it had been agreed between the debtor and the attorney that the latter should retain the land under his redemption, such an agreement would not be binding upon the client. The land was worth nearly four times the amount required to make the redemption, and under such circumstances so unreasonable a contract between an attorney and his client will not be sustained. *Ibid.* 240.

3. *Of dealings between them—and herein, where a third person intervenes in the transaction.* A decree having been rendered declaring a right of redemption of certain premises, and the time fixed for the payment of the money having nearly elapsed, one of the parties in interest, who had sought the redemption, agreed with a third person to sell to him a portion of the land, as a means of getting the money with which to redeem the whole. The proposed purchaser suggested, as a mode of getting the title, that the owners of the land should convey to their solicitor who had obtained the decree of redemption for them, and the solicitor then convey to the purchaser, the latter to assume the

ATTORNEY AT LAW. ATTORNEY AND CLIENT. *Continued.*

payment of the solicitor's fee for obtaining the decree, and which was contingent upon the redemption being accomplished. The matter was consummated in this mode. The land was sold for greatly less than its value, but it did not appear the party in interest who negotiated the sale was deceived by any matters between the purchaser and the solicitor, or that the latter exercised any undue influence over him. It was *held*, that while the transaction would have been impeachable, at the instance of the party who sought to obtain the means for redemption by a sale, if it had been between him and his solicitor, in its principal features, yet, upon the facts, it was regarded as a transaction, not with the solicitor, but with the purchaser, and the party who thus sought the arrangement could not invoke the rule governing the relation of attorney and client as a ground for avoiding the contract. *Alwood v. Mansfield et al.* 496.

4. But the other parties in interest who joined in the deed to the solicitor, were differently situated. They were two sisters of the party who negotiated the sale, and had no knowledge of the real character of the transaction. On making the agreement, the solicitor prepared a deed for the whole of the land from his clients to himself, and sent it by his own agent to these two sisters to be executed by them, the solicitor's agent assuring them that the purpose of the deed was simply to enable the solicitor to obtain a loan on the land with which to redeem under the decree; and, on being questioned on the subject, the agent further assured them that the solicitor was a perfectly honest man and would give them a bond showing the character of the transaction, but that the deed must be made at once, as the time for redemption was about to expire. On these assurances the deed was executed, and on its return to the solicitor he at once conveyed to the purchaser the part originally agreed upon, at a price greatly below its value, the purchaser assuming the payment of the solicitor's contingent fee, and the proceeds of the sale were applied in redemption under the decree. The grantee of the solicitor knew of the fiduciary relation existing between his grantor and his clients, and was a direct party to the act of procuring the deed to the solicitor in the way it was done. It was *held*, the solicitor violated his obligation to his clients in deceiving them as to the purpose of the deed to him, and in attempting to sacrifice their land merely to secure his own fee. And his grantee, who participated in the fraudulent transaction, stood in no better attitude. So it was held such grantee should be deemed a trustee, by virtue of a constructive trust, in respect to that portion of the land belonging to those who had thus been betrayed by their solicitor. *Ibid.* 496.

5. The principles which govern the cases of dealings of persons standing in a fiduciary relation, apply to persons who clothe themselves with a character which brings them within the range of the

**ATTORNEY AT LAW. ATTORNEY AND CLIENT. Continued.**

principle; or, who take instruments, securities or moneys, with notice that they have been obtained by a person filling a position of a fiduciary character, from a person towards whom he stood in such relation. *Alwood v. Mansfield et al.* 496.

6. And there is no distinction, in the application of those principles, between the case of one who himself exercises a direct influence, or of another who makes himself a party with the person who exercises the undue influence. *Ibid.* 496.

**ATTORNEY'S FEES AS COSTS.**

*Under act of 1869.* See **COSTS**, 3.

**BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS.****BILLS OF EXCHANGE.****PROTEST.**

1. *Inland bill.* An inland bill of exchange is not required to be protested. *Smith & McCow v. Curlee*, 221.

**WAIVER OF LACHES.**

2. By the drawer. See **PLEADING AND EVIDENCE**, 14.

**BILL TO REDEEM. See CHANCERY**, 8.**BONDS.****PENAL BOND FOR PAYMENT OF MONEY.**

1. *Extent of recovery thereon.* In an action on a penal bond, conditioned for the payment of the penal sum at a specified time, the introduction of the bond in evidence will establish a *prima facie* case for the plaintiff for the full amount, as debt, and if interest after maturity is recoverable, that should be allowed as damages. *Hoxsey et al. v. Patterson et al. Admrs.* 522.

2. *Judgment thereon—its effect.* If, however, the judgment in such a case provides that the debt be discharged upon payment of a less sum found as damages, then the payment of the damages will operate as a satisfaction of the whole bond. *Ibid.* 522.

**OF A SECOND OR ADDITIONAL ADMINISTRATOR'S BOND.**

3. *Liability thereon.* See **ADMINISTRATION OF ESTATES**, 1 to 4.

**BURDEN OF PROOF. See EVIDENCE**, 23.**CERTIFICATE OF REGISTER OF LAND OFFICE.****OF TITLE THEREUNDER.**

*Subject to levy and sale on execution.* See **SALES**, 8.



## CERTIORARI.

## UNDER THE STATUTE.

1. *Whether it will lie.* Where a party had been duly served with summons in a cause pending against him in the city court of East St. Louis, the mere fact that the plaintiff's name was written Bulter in the summons, instead of Butler, as it was upon the docket, was held not to be a sufficient excuse for his failure to appear and defend the suit, nor would it afford sufficient ground for the statutory writ of certiorari to remove the cause into the circuit court. *Hermann v. Bulter*, 225.

2. In such case the party sued, knowing there was a suit against him, should have appeared, and if the plaintiff's name was wrong in the summons he should have pleaded in abatement. He could not neglect his proper defense, and then have his writ of certiorari. *Ibid.* 225.

## CHANCERY.

## MULTIFARIOUSNESS.

1. No rule or abstract proposition as to what constitutes multifariousness, can be stated. But, as a general rule, the joining in one bill distinct and independent matters, will constitute multifariousness. *Sherlock et al. v. Village of Winnetka et al.* 389.

2. It is not multifariousness to make the collector of taxes a party to have their collection enjoined, and to state in the same bill the grounds and circumstances upon which the relief is sought. Nor is it ground of demurrer to allege, in the same bill, that the common council had passed an ordinance to issue bonds of the municipality for \$8000, for the purpose of building a boarding house for the use of an academy, which would be a charge on the tax payers, to do which, would be in furtherance of a fraudulent scheme to pervert the corporate property to private uses, and is germane to the other facts stated in a bill to restrain the collection of taxes imposed by the common council. *Ibid.* 389.

## CREDITOR'S BILL.

3. *Whether it will lie against the heirs of a deceased debtor.* While there are cases, where there are complicated equities, which might authorize a court of equity to entertain a creditor's bill against the heirs of a deceased debtor, to subject the real estate descended to them to the satisfaction of the debt, and to adjust the equities between the several creditors, yet, ordinarily, creditors of an estate will be remitted to the remedy provided by statute for the settlement and distribution of estates, through the agency of the administrator. *Garvin, Bell & Co. v. Stewart's Heirs*, 229.

4. In this case a creditor had obtained a judgment at law against a surviving partner, and thereupon filed his bill in chancery against the

### CHANCERY. CREDITOR'S BILL. *Continued.*

heirs of the deceased partner, to subject real estate which had descended to them, to the payment of the debt, alleging the insolvency of the surviving partner, and that there was no administrator of the estate. The bill did not disclose whether there were any other creditors. It was *held*, the facts were simple, and there was no reason existing for taking the case out of the ordinary course of administration provided by the statute, and a court of chancery ought not to entertain the bill. *Garvin, Bell & Co. v. Stewart's Heirs*, 229.

5. The fact that the claim may be of an equitable character, will not avail, of itself, to render it proper for a court of chancery to assume jurisdiction, because the probate court, in the matter of the settlement of estates, may take cognizance of equitable claims as well as those which are purely legal in their character. *Ibid.* 229.

6. *Of the requisites of the bill—character of creditor's lien on real estate of deceased debtor.* In a case where the equitable circumstances are such that a court of equity might properly entertain a creditor's bill against the heirs of a deceased debtor, the bill should show there are no personal assets to which resort could be had, because the creditor's lien upon the real estate is only secondary, and depends upon the non-existence of personal assets, and the rule which controls an administrator in that regard applies as well to a creditor who seeks his remedy in chancery. *Ibid.* 229.

### RESCISSION OF CONTRACTS.

7. *For withholding the consideration.* A father, upwards of seventy years of age, induced by the promise of his son to support him and his almost equally aged wife, in comfort during the remainder of their lives, conveyed his farm to his son's wife, and transferred to his son all his personal property. The son took possession of the farm, and by his continued unkindness and ill treatment, in little upwards of a year compelled his parents to leave and take refuge with another child. Upon bill filed by the father to rescind the contract, it was *held*, if the rescission of the contract, in cases of such character, could not be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent. *Oard et al. v. Oard*, 46.

8. And in this case, no accident or misfortune, or unforeseen event of any kind having prevented the son from executing his agreement, and the record disclosing no provocation of any sort, nor any attempt at justification, the inference was regarded as unavoidable that the son procured the deed from his father with intent to treat him in the manner he did. *Ibid.* 46.

9. *Perverting corporate property to private purposes.* Where a municipal corporation has power to purchase land for corporate purposes, and a purchase is made, and in doing so the common council

CHANCERY. RESCISSION OF CONTRACTS. *Continued.*

designed to pervert it to private purposes, that affords no ground for cancelling the deed, as the parties could not be placed *in statu quo*. The vendor could not be compelled to pay for the buildings and other improvements placed thereon, and it would be inequitable for him to get them without paying therefor. *Sherlock et al. v. Village of Winnetka et al.* 389.

## REFORMING A DEED.

10. *So as to affect the rights of a married woman.* It is not competent for a court of equity to reform a mortgage conveying the interest of a married woman in real estate, executed by her, jointly with her husband, so as to essentially change its provisions. *Hutchings et al. v. Huggins*, 29.

## SETTING ASIDE SHERIFF'S SALE.

11. *Inadequacy of consideration* alone, unaccompanied by other ground of interference, is rarely, if ever, held a sufficient reason for setting aside a sheriff's sale of real estate. *Pickering v. Driggers*, 65.

## SPECIFIC PERFORMANCE.

12. A contract to sell at a fair price, or a fair valuation, will be enforced in equity, when it is sufficiently certain, fair in all its parts, for an adequate consideration, and is capable of being performed. *Estes v. Furlong*, 298.

## WHERE A FUND IS UNDER THE CONTROL OF THE COURT.

13. *Remedy of a third person claiming the same.* Where certain municipal bonds which are sought to be reached have been, by the action of a court of chancery, placed in the hands and custody of a trustee, there to remain until the further order of the court, a third person, not a party to the suit in which the order was made so placing the custody of the bonds, but entitled to them, can only reach them by original bill. *Thomas v. County of Morgan et al.* 479.

## WASTING A TRUST FUND.

14. *Duty of the court.* Where a trust fund in the custody of the court is about to be wasted and misappropriated, it is the duty of the court to prevent it. *Ibid.* 479.

## OF CONTRACTS AGAINST PUBLIC POLICY.

15. *Whether equity will interpose as between the parties.* Should a party, indicted for an alleged crime, convey his property to another as security for becoming his bail, and for the purpose of assisting the former to flee from justice, and the parties equally participate in the unlawful transaction, a court of equity would not interfere to restore the property to the grantor, as against a wrongful claim of the grantee that he was the absolute owner. Such a transaction tending to impede or prevent the course of justice, is against public policy, and

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**CHANCERY. OF CONTRACTS AGAINST PUBLIC POLICY. Continued.**

neither of the parties to it, if *in pari delicto*, could invoke the aid of a court of equity in respect to it. *Bashr v. Wolf et al.* 470.

16. But if the parties to such a transaction do not stand *in pari delicto*,—as, if the grantee obtained the conveyance under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that the guilt of the grantor was far less in degree than that of his associate in the offense, the grantee, a court of equity may, in a proper case, interpose to compel the grantee to relinquish his unjust claim to the property. *Ibid.* 470.

17. So in this case, a party having been indicted, and discharged upon bail, the surety on his recognizance, who was his brother-in-law, and the wife of the latter, who was a sister of the accused, advised him to convey his property to such surety and leave the country. The accused, although alleging his innocence, yet being apprehensive of danger, followed the advice, made the conveyance, and fled. On his return afterwards, and seeking to recover his property on the ground the conveyance was intended only as a mortgage to indemnify his bail against loss, a court of equity, regarding the advice given to the accused as for the purpose of getting his property by taking advantage of his fears, through an undue influence, and the parties therefore not *in pari delicto*, granted the relief sought. *Ibid.* 470.

**BILL TO REDEEM.**

18. *Where a judgment debtor has been induced to let the statutory period for redemption expire.* A judgment debtor, whose land had been sold under execution, was induced to allow the time prescribed by the statute for him to redeem, to pass without making redemption, on the promise of another that he would aid him in redeeming after the twelve months expired, through a judgment creditor. Accordingly, before the time for redemption by a judgment creditor had expired, the debtor confessed a judgment in favor of the party thus promising to aid him, and of another, an attorney at law, who had advised the same course for the purpose of such redemption, and these judgment creditors redeemed the premises from the original sale, and the attorney, having purchased the interest of the other, obtained a sheriff's deed and refused to permit the debtor to redeem from him: *Held*, upon bill filed for that purpose, the debtor, under the circumstances, was entitled to redeem from the party who had thus acquired the title. Having lost his right to redeem under the statute by reason of the promise of assistance, the party making that promise could not be allowed to disappoint the expectation he had created in the debtor's mind that the redemption should be for his benefit. *Trotter v. Smith et al.* 240.

**CHANCERY. TRIAL UPON BILL AND ANSWER.**

19. *Waiver.* Where, in a suit in chancery, the defendant, at the return term, filed his sworn answer to the bill, and no replication being filed, the court ordered that the cause be set down for hearing on bill and answer at the next term of the court, upon objection that the court below erred in proceeding to hear evidence in the case, it was *held*, the defendant having appeared, and without objection, proceeded to trial on the evidence, he thereby waived his right to insist that the trial should have been on bill and answer. *Durham v. Mulkey*, 91.

**RETAINING A BILL FOR ALL PURPOSES.**

20. It is a rule of equity practice, that when the court acquires jurisdiction for one purpose, it will retain it for all purposes necessary to complete justice between all parties interested in the subject matter. Hence the rule that all persons in interest must be parties in equity. *Sherlock et al. v. Village of Winnetka et al.*, 389.

21. *After its principal purpose has failed.* Where a bill was filed for the purposes of an injunction, and also asked an accounting between partners, but the bill showed there had already been a settlement between the partners and a balance due the complainant agreed upon, it being determined the injunction would not lie, it was *held*, the bill could not be retained for the mere purpose of compelling the payment of the balance struck on the settlement between the partners, the complainant having an adequate remedy at law therefor, and there being no allegation of fraud or error in the settlement as a ground for equitable cognizance. *Logan v. Lucas et al.* 237.

**PROOF OF ALLEGATIONS OF THE BILL.**

22. *When necessary.* Where the answers to a bill in chancery deny the allegations in the bill, or do not admit them to be true, the complainant is put upon proof of them, and where the record does not contain any evidence and the decree fails to recite that the hearing was upon evidence, the action of the court below, dismissing the bill, will be sustained in the appellate court. *Thomas, Trustee, etc. v. Adams et al.* 223.

**REFERENCE TO THE MASTER.**

23. *Of exceptions to his report.* Where a bill is filed to compel an account, and the defendant fails to answer, is defaulted, the case referred to the master to state the account, and the defendant failed to object before the master, and excepts in the court below, this court will not, where the account is intricate, attempt to state it. The party desiring to have the rulings of the master in receiving and rejecting evidence, or the principles adopted in stating the account, reviewed, should file objections before the master, pointing out the grounds with reasonable certainty, which, if disallowed by the master, may be reviewed by filing exceptions to the report, in the circuit court, for the same reasons urged before the master. *Hurd v. Goodrich*, 450.

**CHANCERY. REFERENCE TO THE MASTER. *Continued.***

24. The exceptions in the circuit court are always based on, and confined to, the objections urged before the master. They are regarded as in the nature of a special demurrer, and must specifically point out the grounds of objection. This court will not, as a general rule, consider any objection to a master's report, unless exceptions were taken in the court below. *Hurd v. Goodrich*, 450.

25. When the master reports the facts correctly, but misapplies the law, in such a case it is not necessary that exceptions should be filed; but this is an exception to the rule. *Ibid.* 450.

**PRESERVING EVIDENCE IN CHANCERY.**

26. *Of the manner thereof.* Where the evidence in a chancery proceeding is not preserved, but it appears from the decree that the court found, upon the evidence, certain facts, upon which the decree is based, it is sufficient—it is not necessary that the decree should contain a recital of all the evidence heard. *Durham v. Mulkey*, 91.

**REMEDY OF AN EQUITABLE ASSIGNEE.**

*In the matter of the holder of an order from a railroad company for municipal bonds issued on subscription to the stock of the company.* See SUBSCRIPTION, 4.

**CREDITOR'S BILL.**

*What constitutes.* See SUBSCRIPTION, 4.

**MAKING NEW PARTIES.**

*Necessity of amending bill for that purpose.* See PARTIES, 2, 3.

**PARTITION OF LANDS OF INFANTS.**

*A court of chancery the guardian of infants, in that respect.* See PARTITION, 1, 2, 3.

**PROOF REQUIRED AS TO INFANTS.** See INFANTS, 2.

**PROOF ON FORMER HEARING.**

*Effect of agreement in respect thereto.* See EVIDENCE, 13.

**OF JOINT RIGHTS AND INTERESTS.**

*Joint purchases for purposes of sale—rights of the parties and how adjusted.* See JOINT RIGHTS AND INTERESTS.

**AMENDMENT OF DECREE.**

*Within what time allowable.* See AMENDMENTS, 1, 2, 3.

**CHATTEL MORTGAGES.** See MORTGAGES, 1, 2.

**CONFESSION OF JUDGMENT.** See JUDGMENTS, 1, 2.

## CONFLICT OF LAWS.

## STATE AND FEDERAL COURTS.

1. *Neither can interfere with the process of the other.* The State courts can not enjoin proceedings in the courts of the United States, nor the latter in the former courts. *Logan v. Lucas et al.* 237. .

2. The defendant in an execution issued upon a judgment rendered in the circuit court of the United States, upon a bill filed in a State court, sought to enjoin, not directly, the plaintiff in the judgment, or the United States officer charged with the execution, but only a third person, who, it was alleged, caused the execution to be issued, and controlled the same, and asked that he might be restrained from any further action in respect to the execution, or in the collection of the judgment, and that he be required to command the officer having the execution, to take no further proceedings under it. This was regarded as an attempted interference with the execution of process from a United States court, and within the rule prohibiting such interference by a State court. *Ibid.* 237.

## CONSIDERATION

## INADEQUACY OF CONSIDERATION.

*As a ground for equity to set aside a sheriff's sale of land.* See CHANCERY, 11.

## CONSTITUTIONAL LAW.

## CREATING A DEBT AGAINST A CITY.

1. *Validity of the act of 1867, "to establish a police force for the city of East St. Louis."* The decisions in the cases of *Lovington v. Wider et al.* 53 Ill. 802, and *The People ex rel. Wider et al. v. Canty*, 55 Ill. 33, holding that the police commissioners of the city of East St. Louis, appointed under the act of 1867, had no power to create a debt against the city, re-affirmed. *City of East St. Louis v. Witts*, 155.

## TAXATION FOR CORPORATE PURPOSES.

2. *Application of the rule of uniformity—constitutionality of the charter of the city of Belleville.* See TAXATION, 1 to 4.

## RIGHT OF TRIAL BY JURY.

3. *On taking private property for public use.* See JURY, 1.

## CONSTRUCTION.

CONSTRUCTION OF CONTRACTS. See CONTRACTS, 9 to 12.

CONSTRUCTION OF STATUTES. See STATUTES, 2 to 13.

CONSTRUCTION OF DECREE FOR DOWER. See DOWER, 4.

36—59TH ILL.

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CONTRACTS.

## OFFER TO SELL LAND.

1. *And what constitutes a payment thereon.* Where one party agrees to sell another a piece of land, at a stipulated price per acre, on which a sum of money is paid, and the vendor gives to the vendee thirty days preference to buy, one half of the price down and the balance payable within one year, with eight per cent interest, and, in addition thereto, to pay a fair valuation for the dwelling house and stables on the premises, at the time the purchaser should want possession, which he could have at any time within sixty days after the first payment, and the written offer to thus sell was executed and delivered to the purchaser: *Held*, that the payment, when the written offer to sell was executed, was a payment on the purchase. *Estes v. Furlong*, 298.

2. That this writing was sufficiently clear and explicit in its terms to constitute, when accepted, a binding agreement to sell the land. *Ibid.* 298.

3. *Condemnation of the land for public use—no change in the rights of parties.* Notwithstanding a law was passed four days after the agreement, authorizing commissioners to condemn lands for park purposes, and after the bill was filed for a specific performance of the agreement, the land was so condemned, and valued at double the price at which the offer was made to sell, and as the purchaser elected to take the land, and had tendered the money, and by agreement the appraisalment put on the house and stabling by the commissioners was stipulated to be taken for the purposes of the suit, and their value paid to the owner, and they conveyed to the commissioners, and \$5100 of the condemnation money was also paid to him, and \$4900, the residue, it was agreed should abide the event of the litigation: *Held*, that these transactions did not affect the rights of the purchaser. *Ibid.* 298.

## OF A UNILATERAL CONTRACT.

4. When a contract is in anywise unilateral, the court will regard any delay on the part of the purchaser with especial strictness, and will exercise its discretion with great care, but an agreement of the character of that in this case will not be regarded as invalid, or as one which will not be enforced. And the payment of the \$300 when the agreement was executed formed a sufficient consideration to support the contract, and the prompt tender of the money was the exercise of the right of election. A party who has not signed a contract for the sale of land may enforce it against one who has, although he could not be compelled to perform it; the want of mutuality may be waived by filing a bill to enforce it, and thus the remedy became mutual. *Ibid.* 298.



CONTRACTS. WHERE A VALUATION IS REQUIRED. *Continued.*

5. Where a contract to sell property stipulates that there should be a fair valuation of a portion of the same, it is implied that it is to be at a reasonable estimate made by the parties, or if they are unable to agree, then to be determined by the court. In such a case the specification of the mode of ascertainment is not an essential ingredient of the contract, but is entirely subsidiary. When, in such a case, no means of ascertaining the value of property thus sold is pointed out, any means adapted to the purpose may be employed. *Estes v. Furlong*, 298.

CONTRACT BY AN ILLITERATE PERSON.

6. Where a party can not read writing, but his wife is a fair scholar, and they examine the agreement, and it was fairly explained to him by the purchaser, and there was no fraud or misrepresentation, it would be a dangerous precedent to permit such an instrument to be defeated on loose and indefinite testimony of the maker that it was not the same, when read on the trial, as when he executed it. *Ibid.* 298.

ALTERATION—FILLING BLANKS.

7. In an action on a school treasurer's bond, it appeared the bond was written by the treasurer, and he left a blank for the names of his sureties and the amount of the penalty. The sureties filed a plea of *non est factum*, and it appeared on the trial that the sureties signed the bond, and the blank for the amount of the penalty was subsequently filled up by the treasurer and delivered to the board, who had no notice that the blank had been filled after the bond was signed. The sureties never gave notice to the board that the bond had been altered, and the treasurer received large sums of money by virtue of having given the bond, and afterwards became a defaulter: *Held*, that if not a fraud perpetrated by the sureties, it is unfair and unjustifiable in morals, and would, if allowed, be an ungracious defense, and that the bond did not become void. *Bartlett et al. v. Board of Education*, 364.

8. When commercial paper and unsealed agreements are signed with blanks, and thus delivered, and the blanks are subsequently filled, the law presumes that authority to fill them was given at the time of their delivery. *Ibid.* 364.

CONTRACTS CONSTRUED.

9. *And herein, of the certainty required.* A party executed a bond to a railroad company, covenanting therein to convey to the company, in consideration of the construction of their road, depot and station house, in a certain locality, the right of way through a certain tract of land belonging to him, "and also seven acres of land in said section, tract and orchard, adjoining to said right of way on either side thereof:" *Held*, the instrument was not so uncertain in its terms as for that reason to be declared a nullity, and that the bond must have been understood by the parties as requiring a conveyance of the right

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

of way wherever the company might choose to establish their track, and a strip of land of uniform width extending along the railway through the entire tract described in the bond, and having three and one half acres on each side of the right of way. *Chidester et al. v. The Springfield & Illinois Southeastern Railway Co.* 87.

10. But the company having so constructed their road as to leave a tract containing but nine-tenths of an acre on one side of the right of way, it was *held*, erroneous, in a suit for the specific performance of the contract, to decree to the company the nine-tenths of an acre on that side, and six and one-tenth acres on the other. The company were at liberty so to locate their road as to entitle them to seven acres, and not having chosen to do so, they can not claim an equivalent on one side of the right of way for what they have voluntarily abandoned on the other. *Ibid.* 87.

11. *Of parol conditions with third persons.* Upon its being contended that the bond was delivered by the obligor therein to a third person, to be held by him until the citizens of the town, in which the tract of land was situated, should raise and pay the sum of \$350, as a further consideration for the conveyance, estimated to be one-half the value of the land, which was never done, but of which condition the company had no knowledge, it was *held*, the bond having been delivered to the company, they, having acted in good faith upon its terms had the right to insist upon their performance without reference to any parol conditions or agreements made with other parties, and of which they were ignorant. *Ibid.* 87.

12. *In regard to fencing, breaking and cultivating a tract of land.* A and B entered into a contract, by the terms of which A was to break and fence eighty acres of land. For the breaking, B was to pay \$3 per acre, and for the fencing, \$6 per hundred rails, A doing the work and furnishing the materials. After specifying the details in regard to this part of the transaction, the contract provided that A should put in a crop of wheat in the fall of that year—1869—B furnishing the seed, and the proceeds of the crop to be equally divided. The contract then provided as follows: "The said A further agrees, that he will thoroughly prepare the ground of the said eighty acres, and sow the same in wheat, in the fall of the year 1870, upon the same terms and conditions as aforementioned for the year 1869:" *Held*, A was not entitled to \$3 per acre for preparing the land for wheat in the fall of 1870, but was to prepare the ground and sow the wheat on the same terms as specified for the preceding year, that is, an equal division of the crop. *Silvers v. Chitwood*, 193.

13. *Construction of a contract as to the duration of an agency.* See AGENCY, 1.

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

14. *Contract for the sale of an edition of books.* A publisher of a book entered into a contract with a bookseller, by the terms of which the latter was to advertise the book in his circulars and lists, for which, and for his commissions on all sales made by him, he was to receive 20 per cent of the gross receipts, to be deducted month by month, at which times he was to account and pay over to the publisher the residue. It was also agreed that the bookseller should sell the entire edition, the publisher reserving "the privilege of selling at retail what few copies might be demanded through him, without commissions to the bookseller." It was *held*, that while it was for the jury to say, from the number of the edition and all the circumstances of the case, what number should be regarded as a "few copies," which might be sold by the publisher without commissions to the bookseller, it could not have been intended to embrace in the reservation so large a proportion of the edition as to exceed one-third thereof. *Myers v. Gross et al.* 436.

15. Nor had the publisher the right, under the contract, to advertise the book and solicit orders for its sale,—that was clearly prohibited by the spirit, if not by the letter of the contract. *Ibid.* 436.

16. Should the publisher, in such case, sell at retail more books than he was authorized to sell under the agreement, the bookseller would be entitled to his commissions on the residue the same as if he had sold the books himself. *Ibid.* 436.

17. It seems, after the making of this contract, by an understanding between the parties, a bill was introduced in the legislature, providing for the purchase, by the State, of a certain number of copies of the book. The bill, as originally drawn, provided that the books should be purchased from the bookseller, who agreed with the publisher to accept half commission on the books to be sold to the State. Subsequently the publisher procured the bill to be so amended that the books should be purchased directly from him: *Held*, this change in the law did not operate to deprive the bookseller of his right to his commissions on the sale to the State, as it did not matter, under their agreement, by which of the parties the books were furnished. *Ibid.* 436.

## RESCISSION OF CONTRACTS.

18. *By one party, for non-performance.* A party to a contract who is himself first in default, can not declare the contract at an end by reason of non-performance by the other party. *Ibid.* 436.

19. So, in this case, the publisher violated the contract by refusing to account to the bookseller for his commissions on books sold beyond the number the former was authorized to sell under the contract, and thereby the bookseller was justified in refusing to pay the drafts of the publisher for proceeds of sales he had made himself, without forfeiting his right to have the contract fully executed. *Ibid.* 436.

CONTRACTS. RESCISSION OF CONTRACTS. *Continued.*

20. *Rescission of contracts in chancery.* See CHANCERY, 7, 8, 9.

## WHEN A PROMISSORY NOTE BECOMES DUE.

21. *Construction of a note in that regard.* See PLEADING AND EVIDENCE, 6, 7, 8.

## CONVENING ORDER.

## NECESSITY THEREOF.

When a record is presented to this court on error, it should have a *placita*, that it may appear that the record presents the proceedings of a court. *Rich et al. v. City of Chicago*, 286.

## CONVEYANCES.

## ESCROW.

1. *Where a deed intended as an escrow is put upon record without the knowledge or consent of the grantor.* Where a vendor of land executed a deed and left it in the hands of the officer taking the acknowledgment, to be by him delivered to a third person who was to hold it as an *escrow* until the purchase money should be paid, but, without ever having come to the hands of him who was to hold it as an *escrow*, the deed was placed upon record, without the knowledge or consent of the grantor, it was *held*, the agreement between the parties that the deed was not to be delivered or recorded until the purchase money should be paid, continued until changed by the consent of the vendor, and a subsequent purchaser from his vendee, with notice, would hold subject to the rights and equities of the first vendor, arising from such agreement. *Illinois Central Railroad Co. v. McCullough*, 166. /

## DELIVERY OF A DEED.

2. *What constitutes.* In case of a sale of the land by the first vendee, and the acceptance by his vendor of the notes of the second purchaser for the unpaid purchase money due the former, together with a mortgage from the latter on the same premises, to secure such notes, which were taken in lieu of the notes given by the first purchaser, a recognition by the original vendor, of title in the mortgagor, would be implied thereby, and his assent to the delivery of his deed to his vendee. *Ibid.* 166.

3. But such a transaction would not, of itself, import that the assent of the original vendor, to the delivery of the deed, was given at any time prior to the acceptance of the notes and mortgage of the second purchaser, nor would it necessarily imply a ratification of the obtaining possession of the deed and putting it on record, contrary to the agreement in respect thereto. The legal intendment could be no more than that the first vendor consented to a change in the form of his security, and assented to the delivery of the deed to his vendee, on

CONVEYANCES. DELIVERY OF A DEED. *Continued.*

the condition that he should, at the same time, receive back a mortgage of the lands to secure the payment of what remained due to him. *Illinois Central Railroad Co. v. McCullough*, 166.

4. *And herein of an intervening incumbrance.* The assent by the original vendor to the delivery of the deed to his vendee, and his acceptance of the mortgage from the second purchaser, being simultaneous acts, and the title resting but for an instant in either vendee, a deed of trust executed by the first vendee to a third person prior to that transaction, would not attach as a lien upon the land, to the prejudice of the subsequent mortgage, merely by reason of the title remaining in the maker of the deed of trust or the subsequent mortgagor for the brief interval necessary to the consummation of the transaction, as would have been the case if it had so remained for any time. *Ibid.* 166.

## CORPORATION.

## FRAUDULENT ORGANIZATION.

1. A number of persons organized a telegraph company, and one of the number subscribed for nearly all of the stock and transferred it to another person to hold as trustee, and to represent and sell the same, but no money was to be paid by those organizing the company, and such subscriber, by contract with the company, undertook to build two thousand miles of line, but the agreed price was largely above the cost of construction; an election was held, where a large number of well-known business men, not stockholders, or consenting thereto, were elected directors; a circular was issued referring to the objects and prospects of the company, and the names of these persons were given as directors, and in the same circular persons were solicited to subscribe for stock, and it was stated that on the payment of forty per cent on the share, a certificate of stock would be issued, and no further call would be made thereon. It was also provided, by a by-law, that no general meeting of the stockholders, or election of directors, should be held until the two thousand miles of line should be built and equipped, or until the persons holding a majority of the stock should petition the president to call a meeting. Many persons became subscribers and paid forty per cent on their stock, and four hundred and seventeen and one-half miles of line was constructed at a cost of \$126,550.90, and \$25,000 had been paid on work not completed: *Held*, that the scheme was fraudulent, intended to enrich the contractor, and the plan so devised that the *bona fide* stockholders should not have any control of the affairs of the company, by electing directors, until two thousand miles of the line should be completed. *Terwilliger v. The Great Western Telegraph Co. et al.* 250.

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**CORPORATION. FRAUDULENT ORGANIZATION. *Continued.***

2. It was further held, that the *bona fide* stockholders should have relief, and that the lines constructed belonged to the subsequent subscribers whose money built them, and that the contracts should all be set aside; the amount of money paid by the subscribers ascertained, and certificates of stock to be issued to them so far as paid for, at forty per cent. An election was directed to be called for a new board of directors by such stockholders, at which election only actual holders of stock subscribed and paid for should be allowed to vote, and if a settlement should not be made by the new directors with the contractor, satisfactory to the court, the cost of constructing the lines already built, as nearly as possible, to be ascertained, and the contractor to be allowed the cost and a reasonable compensation for his time and labor, and the court was directed to render a decree against him for any excess, to be paid to the treasurer appointed by the new board. The president and secretary were required to produce all books and papers that might be necessary in the adjustment, and if the company, as now organized, interpose any obstacles in the way of carrying the orders of the court below into execution, a receiver to be appointed to take charge of the entire affairs of the company. *Torwilliger v. The Great Western Telegraph Co. et al.* 250.

**MUNICIPAL CORPORATIONS.**

3. *How far subject to judicial control, and herein of the general character of their powers and duties.* A court of equity may grant relief against a municipal corporation as well as against a natural person, in most cases. But there are acts which a corporation may do within the limits of its charter, without being subject to the supervision of any court; such acts are those done under its legislative and discretionary powers. *Sherlock et al. v. Village of Winnetka et al.* 389.

4. *In respect to the property of the corporation.* A municipal corporation, in reference to its property, stands on the same footing as other corporations. Its corporate property is held in trust for the benefit of its constituents, and it is bound to administer such property faithfully, honestly and justly, and if guilty of a breach of trust by disposing of valuable property without any, or for a nominal, consideration, it will be regarded in the light of the representative of a private individual or private corporation. The fact that the forms of legislation are used in committing such a breach of trust, will not change the character of the act. Such is not the exercise of political power, delegated for public purposes, and exemption from judicial interference terminates where legislative action ends. *Ibid.* 389.

5. *Issuing corporate bonds, only for corporate purposes.* The common council has no authority to purchase lands, erect buildings, and

CORPORATION. MUNICIPAL CORPORATIONS. *Continued.*

issue bonds pledging the corporate property and the faith of the corporation, for any but municipal purposes. Where the design in purchasing the land, erecting the buildings and issuing the bonds, is for private, to the exclusion of corporate purposes, and for private gain, it is a gross breach of trust, a fraud upon the law and the tax payers of the municipality, and a court of equity will take cognizance of such a case. *Sherlock et al. v. Village of Winnetka et al.* 339.

6. *Sale of municipal bonds—to whom allowable.* See PURCHASERS, 4, 5, 6.

## COSTS.

## AGAINST AN ESTATE.

1. Estates are not answerable for costs on claims filed after the term of the probate court appointed by the administrator for adjustment. *Russell v. Hubbard et al.* 335.

## AGAINST AN ADMINISTRATOR PERSONALLY.

2. An administrator can never be made personally liable for costs except upon proof of *mala fides* or gross negligence on his part. *Ibid.* 335.

## ATTORNEY'S FEES AS COSTS.

3. *Construction of act of 1869.* The act of 1869, being construed as intending the taxation of counsel fees in partition suits only in cases where the proceedings are amicable, does not apply to a suit begun as an amicable one but which afterwards develops into the ordinary case of adverse parties, at least so far as regards the services rendered after the suit partakes of such nature. *Lilly et al. v. Shaw et al.* 72.

## COUNTY TREASURER.

## SURETY ON HIS BOND.

*Of increasing the liability after the execution of the bond.* See SURETY, 4, 5.

## COVENANTS.

## WHERE COVENANTEE VOLUNTARILY YIELDS.

*Whether he may have his action on the covenant.* The owner of a lot of ground contemplating the erection of a frame building thereon, the owner of a brick house situated on the line of an adjacent lot proposed to him that if he would build of brick he might use the brick wall of the house for the purpose of attaching thereto the proposed new building. The proposition was accepted, and the new house was built of brick and attached to the wall of the other building as proposed: *Held*, where the party to whom the license was given, and who had executed its purpose, subsequently conveyed with covenant to his grantee

## COVENANTS.

WHERE COVENANTEE VOLUNTARILY YIELDS. *Continued.*

against any damages resulting to the latter in respect to the matter of such license, such grantee can not, by voluntarily yielding to a claim based upon an alleged right to revoke the license when such right of revocation did not exist, have any right of action upon the covenant. *Russell v. Hubbard et al.* 335.

## COVENANTS FOR TITLE.

## COVENANT AGAINST INCUMBRANCES.

*Pass to remote grantee.* A remote grantee of lands may maintain an action in his own name against the original grantor, on a covenant in the deed of the latter, "that the said lands are free from all incumbrances," where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee. Although in such case the covenant is nominally broken on the execution of the deed, the rule of the common law, that *choses in action* are not assignable, does not apply. *Richard v. Bent*, 88.

CREDITOR'S BILL. See CHANCERY, 3 to 6.

## CRIMINAL LAW.

## RETURN OF INDICTMENT INTO COURT.

1. *And of the evidence thereof.* Before a party can be legally tried on an indictment, it must appear from the record that the indictment was returned by the Grand Jury into open court. Such fact not appearing in the record, a motion in arrest of judgment should be allowed. *Sattler v. The People*, 68.

2. *The minutes of the judge* are no part of the record, and although they show the indictment to have been so returned, that does not have the force or effect of a record. *Ibid.* 68.

## MALICIOUS MISCHIEF.

3. *What constitutes.* Upon the trial of a party on an indictment for malicious mischief, it appeared there was a controversy between the prosecutors and the defendant, in regard to the possession of a certain lot of ground, the defendant being in the actual possession. Upon the prosecutors attempting to run a division fence across the lot, the defendant took up the posts and tore off the boards while the fence was in process of erection, and forbade them from making the fence, protesting they had no right to do so, and that he was paying rent for the whole of the premises: *Held*, an instruction offered by the defendant, that, if the jury believed, from the evidence, he was in possession of the premises, and paying rent, they should find him not guilty, should have been given. The statute in regard to malicious



CRIMINAL LAW. MALICIOUS MISCHIEF. *Continued.*

mischief (R. S. Ch. 80,) does not apply to cases of this kind, where opposition is made by a claimant of premises of which he is in actual possession, to the erection of a fence across the same without his consent. *Sattler v. The People*, 68.

## LOTTERY.

4. *What constitutes.* In a prosecution for the alleged sale of a lottery ticket, it appeared the ticket was as follows:

"CHICAGO INDUSTRIAL COLLEGE AND HOME FESTIVAL

"This ticket is a receipt for \$5, in payment for and delivery of a copy of a steel plate engraving, and admission to our concerts and lectures, for which it is sold.

"By order of the officers,

THOMAS & Co., General Agents."

Besides the ticket, a steel plate engraving was delivered to the purchaser, and also a bill, entitled, "Grand National Festival, to erect in the city of Chicago an Industrial College and Home for Unfortunate Females," and it was proposed in the bill to give a series of musical receptions, and a course of lectures, in Chicago, at the close of which, and after the sale of 200,000 copies of steel plate engravings, to distribute to the purchasers of engravings, "in a just and legal manner," \$200,000 in presents, amounting in number to 3012. Twenty-eight hundred of this number were to be the newspapers of Chicago, at a price from \$2 to \$12 each. The remaining 212 were estimated at \$35,000 to \$50,000. It was *held*, this was "a scheme for the distribution of prizes by chance," and constituted a lottery, within the meaning of the statute. *Thomas v. The People*, 160.

5. The fact that no plan of distribution had been determined upon at the time of the sale of the ticket, would not relieve the scheme of its character as a lottery, when it was apparent that some of the purchasers of tickets would fail to receive a prize. The promise that the distribution should be in "a just and legal manner," was evasive. *Ibid.* 160.

6. And even if the ticket to the concerts and lectures, and the engraving, were intrinsically worth the price paid for the ticket, the scheme would still be a lottery. *Ibid.* 160.

## EVIDENCE OF INTENT.

7. It was proper, in such case, to admit in evidence, on behalf of the prosecution, not only the ticket sold, but the bill or advertisement delivered to the purchaser, which explained the purposes and character of the scheme, and also other tickets and bills or advertisements of similar kind, sold and delivered by the accused to other parties, as tending to prove the intent with which the ticket was sold. *Ibid.* 160.

### CRIMINAL LAW. EVIDENCE OF INTENT. *Continued.*

8. If the intent can not be implied from the facts and circumstances which, with the intent, constitute the crime, then other acts of the party, from which it can be implied, may be proved. Whatever will prove the intent, is admissible, either to show *scienter* or guilty knowledge. *Thomas v. The People*, 160.

#### VENUE—PROOF OF, NECESSARY.

9. The failure, in a criminal case, to prove the county in which the offense was committed, is fatal to a conviction. *Sattler v. The People*, 68.

### COLLECTION OF FINES, FORFEITURES AND PENALTIES.

10. *By State's attorneys—under act of 1865.* See STATE'S ATTORNEYS, 1, 2.

### DECREE.

#### ALTERING OR SETTING ASIDE DECREE AT SUBSEQUENT TERM.

1. Where the decree is signed and filed for record, or where it is ordered by the court to be recorded, and is duly filed for record by the clerk, and the term has expired, it becomes a matter of record, and can not be altered or amended on motion, except as a mere matter of favor, or quite of course. *Hurd v. Goodrich*, 450.

#### DECREE IN FAVOR OF THE "DEFENDANTS."

2. *When all are not entitled.* Where a grantor of land sought by bill in chancery to rescind the deed, making his grantees, and also a tenant in possession, parties defendant, and a decree was rendered setting aside the conveyance, but directing that the complainant pay to the "defendants" a certain sum for improvements: *Held*, as all the defendants would, by the terms of the decree, be entitled to participate in the sum so directed to be paid, when the tenant was not entitled to any part of it, the decree was, to that extent, erroneous. *Oard et al. v. Oard*, 46.

#### CONSTRUCTION OF DECREE FOR DOWER.

3. *As to the extent of the lien thereof.* See DOWER, 4.

### DEDICATION.

#### BY WHOM TO BE MADE.

1. A primary condition of every valid dedication is that it shall be made by the owner of the fee. *Baugan v. Mann*, 492.

2. In a suit to enjoin the defendant from erecting a building on a certain parcel of ground, on the allegation that the *locus in quo* had

**DEDICATION. BY WHOM TO BE MADE. *Continued.***

been dedicated as an alley by a former owner of the fee, from whom the complainant deduced title to a lot adjacent to such alley, it was not shown that the person who made the alleged dedication had title to the premises, nor did it appear that the defendant claimed title under him, so the complainant failed in his proof, it being essential to the validity of the dedication that the person making it was the owner of the fee. *Baugan v. Mann*, 492.

**FOR PURPOSES OF A STREET.**

8. *What constitutes.* In the year 1817, the owner of the land upon which the town of Golconda, in Pope county, in this State, is situated, laid off the same into town lots, streets and alleys, and made and recorded a plat of the town thus laid out. A memorandum was endorsed on the plat, defining the width of the streets and alleys, "excepting Water street, which includes all of the ground from the front lots to the river." The plat was not signed or acknowledged. At that time there was no statute regulating the execution of town plats. This was held to be a sufficient dedication, by the common law, to the public, of all the ground between the lots fronting on the Ohio river, and the river itself. *Field v. Carr et al.* 198.

**DEEDS. See CONVEYANCES.****DEFAULT.****SETTING ASIDE DEFAULT.**

1. *For want of proper service of process.* Where a bill for a divorce was, upon a default, taken as confessed, and the next day the defendants filed affidavits proving satisfactorily that the person with whom the copy of the summons was left was not a member of his family, and a motion entered to set aside the default, and be permitted to answer, but the motion was overruled: *Held*, that it was error to overrule the motion. *Brown v. Brown*, 315.

2. *Contradicting a return upon process.* While the rule is well established, that the return of an officer can not be contradicted, and is founded on public policy for the protection of innocent persons in their rights acquired under legal proceedings, yet there are some few cases which are excepted from the rule, and this case is one of those exceptions. But it is not in every case of a default that it will be permitted to contradict the return. *Ibid.* 315.

**DELIVERY.**

**DELIVERY OF A DEED.** See CONVEYANCES, 2, 3, 4.

**DEMURRER.**

**CARRIED BACK TO FORMER PLEADING.** See PLEADING, 13.

## DEMURRER TO EVIDENCE.

### WHAT IS ADMITTED THEREBY.

1. Where a demurrer is interposed to the evidence, the rule is, that the demurrer admits not only all that the plaintiff's testimony has proved, but all that it tends to prove. *Fent et al. v. Toledo, Peoria & Warsaw Railway Co.* 349.

## DESCRIPTION.

### DESCRIPTION OF A NOTE.

*In a warrant of attorney to confess a judgment.* See JUDGMENTS, 2.

## DOWER.

### OATH OF COMMISSIONERS.

1. *Necessity thereof.* In a proceeding by petition for assignment of dower, where the report of the commissioners appointed to assign dower stated that they were duly sworn in open court, but the character of the oath taken nowhere appeared in the report or other portions of the record: *Held*, this omission in the record was fatal. The statute is peremptory that the commissioners shall take an oath, and what it shall contain is specifically prescribed. It must appear that the oath conformed to the requirements of the statute. *Durham v. Mulkey*, 91.

2. *Exceptions not required.* In such a proceeding, and as to such a requirement, it is for the party relying upon the action of the commissioners to show that the statute has been pursued, and it is unnecessary that any exceptions should be filed to the report of the commissioners, to render tenable, on error, the objection that their oath did not conform to the statute. *Ibid.* 91.

### OF A MONEY DECREE IN LIEU OF DOWER.

3. Where a sum, to be paid annually, is decreed the widow in lieu of dower, it is proper to decree that an execution may issue for the collection of the same, in case of default in the payment thereof; but when a lien is retained on the land, the decree should require it to be first sold under the execution. *Ibid.* 91.

### DECREE FOR DOWER.

4. *Construction thereof.* In a proceeding for assignment of dower in certain premises in which the widow was only entitled to dower in the one undivided half thereof, the decree rendered therein directed: "that the said dower \* \* \* be a lien on the said premises, to wit: on the undivided half of the lands hereinbefore described." Upon objection to the decree, that it made the dower a lien on the whole of the premises, it was regarded as not open to such objection. *Reeves et al. v. Reeves*, 203.

**EASEMENT.****RIGHT OF WAY OVER THE LAND OF ANOTHER.**

In an action for the trespasses of the defendant's children in passing over the land of the plaintiff, in going to and returning from school, it appeared the school house was built by and for the public, on a small lot forming a part of the tract owned by the plaintiff. The children could not conveniently, and without traveling a very considerable distance, approach the school house without passing over the plaintiff's land: *Held*, until a highway to the school house was provided, the children, they residing in the district, had the right, necessarily, to travel over the land of the plaintiff in going to and returning home from school. *Wilson v. Garrard*, 51.

**EJECTMENT.**

**EVIDENCE IN EJECTMENT.** See **EVIDENCE**, 18, 19, 20.

**EMINENT DOMAIN.****RIGHT OF TRIAL BY JURY.**

1. *On the taking of private property for public use.* See **JURY**, 1.

**DETERMINING THE QUESTION OF COMPENSATION.**

2. *Is a judicial question.* See **JUDICIAL ACTION**, 1.

**ENTRY BY FORCE.****TO REMOVE FIXTURES.**

*Not allowable.* See **TRESPASS**, 2.

**ERROR.****WHETHER ERROR MAY BE ASSIGNED.**

*By a party who declined to accept a new trial in the court below, which was offered him on terms.* See **NEW TRIALS**, 4.

**ESCROW.****DELIVERY OF A BOND AS AN ESCROW.**

*Effect on the rights of a surety where the bond is delivered without performance of the condition.* See **SURETY**, 1, 2, 3. Also see **CONVEYANCES**, 1.

**ESTOPPEL.****SUBSEQUENT PURCHASERS.**

1. Where the owner of land laid off the same into town lots, and made out and recorded a plat of the same, dedicating certain portions to the use of the public, it was *held*, the vendor of the party who thus laid out the town, having filed a bill in chancery to subject the lots to the payment of the purchase money, and the sale under the decree in that suit being made according to the plat, purchasers at such sale would be estopped to deny the validity of the plat, and a conveyance

ESTOPPEL. SUBSEQUENT PURCHASERS. *Continued.*

by the commissioner who executed the decree, of the ground so dedicated to the public, would pass no title thereto. *Field v. Carr et al.* 198.

2. *Of property not belonging to the vendor.* Where a person who holds a contract of purchase of land, stands by and sees another purchase the same land from his vendor, paying his own money therefor, and fails to make known any claim in respect to the land, he will be estopped from afterward claiming that the second purchaser bought for his benefit. *Baehr v. Wolf et al.* 470.

## PRIVY TO A JUDGMENT.

3. *How far estopped by denying its operation.* See OFFICERS, 5.

## EVIDENCE.

## PAROL EVIDENCE.

1. *To prove a settlement and balances of account.* In an action on the official bond of a county treasurer, where books and papers given in evidence are voluminous, it is not error to permit a witness, who has made computations therefrom, to testify to balances and the results of such computations, and to settlements made by the treasurer and the board of supervisors, but it is error to permit him to testify to a report of the finance committee made in the absence of the treasurer, and in which he had not participated, and to which he had not assented. *Smith v. Board of Supervisors of Peoria County*, 412.

2. *To prove the approval of a school treasurer's bond.* Parol evidence is admissible to prove that a board of education had, in fact, approved the bond of their treasurer, although it was not entered on the minutes of the proceedings of the board. *Bartlett et al. v. Board of Education*, 364.

## DECLARATIONS OF A PARTY.

3. *Whether admissible in his favor.* Declarations made by one of two contesting parties, out of the presence of the other, are inadmissible as evidence in his favor. *Cottom v. Holliday*, 176.

## ADMISSIONS.

4. *Admissions of prior holder of a note, as against a subsequent assignee.* Where the holder of a chose in action already matured, makes admissions and declarations against his interest in respect thereto, while such holder, such admissions and declarations are competent as original evidence against an assignee after maturity. *Sandifer v. Hoard*, 246.

5. So in an action on a promissory note, by an assignee thereof, against the maker, where the defendant pleaded payment to the payee while he was holder of the note, and averred the note was assigned to plaintiff after maturity, it was held, that, for the purpose of showing

**EVIDENCE. ADMISSIONS. *Continued.***

the defense of payment, admissions and declarations of the payee made while the note was held by him, and after it was due, to the effect that it had been paid by the maker, were admissible as evidence. *Sandifer v. Hoard*, 246.

6. Nor is the admissibility of such evidence affected by the circumstance, whether or not the declarant is a competent witness, or whether he was, in fact, a witness for the defendant. *Ibid.* 246.

7. The evidence was admissible, on the broad ground that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception. *Ibid.* 246.

**CONVERSATIONS.**

8. Witnesses should state facts, and not mere inferences or conclusions; and where a witness is testifying in respect to the alleged admissions of another, if he is unable to give the words, language, or the substance of it, he should not testify at all; the witness can not be permitted to give a mere conclusion of his own, when the conversation or declarations from which the conclusion is drawn have passed from his mind. *Helm v. Cantrell et al.* 524.

**OF A COMMUNICATION FROM ONE PARTY TO THE OTHER.**

9. In an action to recover for the board of the defendant and his hired hands, it is competent for the defendant to prove a communication from him to the plaintiff in respect to the board of such of his hands as might fail to work for him. *McBride v. Griffin*, 227.

**OPINIONS OF WITNESSES.**

10. The mere opinion of a witness as to value, or the amount of damages property has sustained, is usually admissible when based on information as to value, or the extent of the injury when testifying as to the amount of damage. When a witness has stated his knowledge of the value of the class of property about which he is testifying, he may usually be asked his opinion, but not otherwise. *Cooper v. Randall et al.* 817.

11. It is not error for the court to refuse to permit a witness to answer a question as to the cost of constructing a house, who had stated he was not a mechanic and was unacquainted with such cost. *Ibid.* 817.

**EVIDENCE OF DECEASED WITNESS ON FORMER TRIAL.**

12. *Act of 1867.* In an action on a promissory note, against the administrator of the maker, on which the same party had previously brought suit against the maker in his life time, the latter testifying therein in his own behalf in relation to the note, but the former took  
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## EVIDENCE.

EVIDENCE OF DECEASED WITNESS ON FORMER TRIAL. *Continued.*

a non-suit, the defendant offered to prove by a witness who was a juror on the trial of the former suit, and who stated that he remembered the testimony of deceased at that time, what the deceased testified to in relation to the note, and how his signature thereto was obtained: *Held*, the evidence, being material to the issue, was competent as falling within the general rule that the testimony of a deceased witness, on the same subject matter between the same parties, may be given on a second trial by any one who remembers it, whether the testimony was reduced to writing or not. Although the action was against an administrator, there is nothing in the act of 1867 that renders such testimony incompetent. *Hutchings, Admr. v. Corgan*, 70.

## EVIDENCE ON FORMER HEARING IN CHANCERY.

18. *Effect of agreement in respect thereto.* An agreement as to what the exhibits in a cause proved on the hearing, will not operate as evidence on a hearing subsequently had, upon a reversal of the first decree; and if such agreement could be given any effect upon a second hearing, as to parties in court at the time it was made, it could not bind new parties to the record who gave no assent thereto. *Thomas, trustee, etc. v. Adams et al.* 223.

## ADMISSION OF EVIDENCE WITHOUT OBJECTION.

14. *Whether conclusive as to its legal effect.* In an action of debt against the city of East St. Louis, upon certain certificates of indebtedness, termed scrip, issued by such police commissioners, it was *held*, while the admission of such certificates as evidence, without objection, precluded the defendant from raising any question as to the execution of the certificates, or their genuineness, yet it did not preclude it from questioning their legal effect as a basis of recovery, either upon the argument of the case before the court, or upon a motion for a new trial. *City of East St. Louis v. Witts*, 155.

## OF INJURY TO OTHER PROPERTY.

15. *Than that in controversy.* In an action on the case for injury to a dwelling house by the erection of a mill, by which dust, dirt and other impurities are thrown in and upon the house, it is error to exclude evidence that such impurities were thrown by the mill upon other buildings in the vicinity of plaintiff's house, as such evidence is pertinent to the issue. While such proof would not be direct as to the amount of impurities actually deposited on the plaintiff's house, it would tend to show that the mill was capable of inflicting the injury complained of, and justify the inference that if other buildings similarly situated were thus affected, the same would be true as to the plaintiff's premises. *Cooper v. Randall et al.* 817.



EVIDENCE. *Continued.*

## TO WHOM PAYMENT SHALL BE MADE.

16. *Evidence in respect thereto—burden of proof.* A party purchased of another a lot of mules at a specified price per head. In an action by the vendor against the purchaser for the price of a portion of the mules, the rest having been paid for, the plaintiff declaring on the common counts, to which the general issue was filed, with a notice of set off, the defendant relying upon an agreement that the payment was to be settled with a third person, it was *held*, the plaintiff having proven the sale of the mules to the defendant, it devolved upon the latter to show that the purchase was not in the usual course of business, and that some special contract or agreement was made in reference to the purchase, to rebut the presumption that the money was to be paid to the vendor. *Smith et al. v. Cornell et al.* 66.

## ACCOUNT BOOK.

17. *When admissible.* In a suit on the bond of a treasurer of a school board, against him and his sureties, for money received and not accounted for by him, it is not error to admit his account book, as treasurer, to show the amount of money received by him, and this, too, although the entries were made by his clerk, and especially so when the treasurer swore that there was in his hands a sum equal to that shown by his books. *Bartlett et al. v. Board of Education*, 384.

## IN EJECTMENT.

18. *Of deeds involving conflict of title.* Where a plaintiff in ejectment read in evidence certain deeds in his chain of title, to which there was no objection in matter of form, or in respect to their execution or acknowledgment, it was held to be error to exclude them from the consideration of the jury, although there was some evidence of title to the remote grantors of the defendant, from the common source, prior in date to those deeds. The validity of such title of the defendant was questioned, and any danger of a misconception of the true state of the title from the deeds excluded, could have been obviated by proper instructions. Being pertinent to the issue, they should have been left to the consideration of the jury. *Harpham et al. v. Little*, 509.

19. *Of a deed executed pending an injunction in respect thereto.* In ejectment, the plaintiff read in evidence a deed to himself, which was executed pending an injunction restraining the grantor from making any disposition of the property; but an objection upon that ground was held not tenable. The defendant in ejectment was not a party to the injunction suit, which was for the benefit of the complainants therein, particularly; and even if the grantor of the defendant had an interest in the subject matter of the injunction, in the pending action neither of them had any cause for complaint. *Ibid.* 509

### EVIDENCE. IN EJECTMENT. *Continued.*

20. Moreover, the complainant in the injunction suit had, under the authority of the decree therein, conveyed to the same grantee, and it was a fair presumption that the deed thus objected to was executed in harmony with, and carrying out the wishes of the complainant, who had obtained the injunction. *Harpham et al. v. Little*, 509.

### OF THE RECORDING OF A DEED.

21. *And herein, of parol evidence.* Where a prior deed is sought to be given in evidence to affect rights claimed under a subsequent deed, if it be attempted to show by parol that the former deed was recorded, with a view to notice, the time of the recording should be shown. *Ibid.* 509.

22. But parol evidence is not the best evidence to show that a deed was recorded, and should not be allowed unless the proper foundation is laid for secondary evidence. *Ibid.* 509.

### BURDEN OF PROOF.

23. Where a third person was a party with a solicitor in a transaction with clients of the latter, and seeks to hold property thus secured, the burden is upon him, as it would have been upon the solicitor, to show that the transaction was in all respects just and fair. *Alwood v. Mansfield et al.* 496.

### PLAINTIFF'S EVIDENCE MUST PREPONDERATE.

24. A party holding the affirmative of a proposition is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other. The plaintiff's case, under such circumstances, is not proved. *Broughton v. Smart*, 440.

### CROSS-EXAMINATION.

25. The cross-examination of witnesses is largely discretionary with the court, in its scope, and a judgment will not be reversed because the court refused to permit a witness to answer a question on cross-examination, unless it appears that the party may have been injured thereby. *Cooper v. Randall et al.* 317.

### EVIDENCE IN REBUTTAL.

26. *As to what caused the injury complained of.* In an action to recover damages for a depreciation in the value of the plaintiff's dwelling house, alleged to have been occasioned from dust and other impurities thrown upon and into the house from the defendant's mill, it is competent for the defendant to prove that such depreciation in value resulted from some other cause. *Ibid.* 317.

EVIDENCE. *Continued.*

## PROOF OF ASSIGNMENT OF PROMISSORY NOTE.

*Under what state of pleading necessary.* See ASSIGNMENT, 1, 2, 3.

## TELEGRAPHIC DISPATCH AS EVIDENCE. See TELEGRAPHY, 2.

## AS TO WHAT IS A CORPORATION NEWSPAPER. See NOTICE, 2.

## DEGREE OF PROOF REQUIRED.

*To rescind a contract for fraud.* See FRAUD, 5.

## EVIDENCE IN CRIMINAL CASES. See CRIMINAL LAW, 7, 8.

## PRESERVATION OF EVIDENCE.

*Necessity therefor, on assessment of damages on dissolution of injunction.* See INJUNCTIONS, 8.

## PRESERVING EVIDENCE IN CHANCERY. See CHANCERY, 16.

## EXCEPTIONS AND BILLS OF EXCEPTIONS.

## WHETHER EXCEPTIONS NECESSARY.

1. *Where a report of commissioners assigning dower omits to show they were properly sworn.* See DOWER, 2.

## EXCEPTIONS TO MASTER'S REPORT.

2. *When necessary, and when not.* See CHANCERY, 13, 14, 15.

## BILL OF EXCEPTIONS.

3. *Motions—whether a part of the record unless preserved by bill of exceptions.* Upon appeal from the judgment of the circuit court in an action on a promissory note, the sustaining of plaintiff's motion to strike the defendant's plea denying the execution of the note from the files, being assigned for error, this court refused to consider the same for the reason that the bill of exceptions did not show any such motion was made, or any ruling of the court upon it, or that any exception was taken. Motions of such a character do not become a part of the record unless made so by a bill of exceptions. *Gaddy v. McCleave*, 182.

## EXECUTION.

## WHO MAY CONTROL IT.

1. An execution is the process of the plaintiff therein; and he has the right to control it without any interference on the part of attorney or officer. *Morgan et al. v. The People, use of Lewis*, 58.

## ORDER BY PLAINTIFF TO SUSPEND SALE.

2. *Liability of officer for disregarding it.* See OFFICERS, 1, 2, 3.

3. *Giving such direction by telegraph.* See TELEGRAPHY, 1.

## OF A SECOND EXECUTION.

4. *Pending a levy on realty under former execution.* See LEVY, 1.

**EXECUTION. Continued.****AWARDING EXECUTION ON DECREE.**

5. *When proper.* See DOWER, 3.

**WHAT IS SUBJECT TO LEVY AND SALE.**

6. *Of title under certificate of register of land office.* See SALES, 8.

**FORCIBLE ENTRY AND DETAINER.****OF THE POSSESSION REQUIRED.**

1. The plaintiff, to recover in an action of forcible entry and detainer, must show that he had, at the time of the alleged entry, the actual possession of the premises described. A mere constructive possession, such as the fee simple title to the land entered upon draws to it, is not sufficient. *Thompson v. Sornberger*, 326.

**TITLE NOT INVOLVED.**

2. The question of title is not, in any sense, involved in the action. *Ibid.* 326.

**ALLEGATIONS AND PROOFS.**

3. *As to the description of the premises.* Proof that the plaintiff was possessed of a part of the premises described in the complaint, does not authorize a recovery of such part. The act regulating the action requires a particular description of the premises to be made in the complaint, and the proof must follow and conform to the description therein. *Ibid.* 326.

**LIMITATION OF THE ACTION.** See LIMITATIONS, 3.

**FORMER ADJUDICATION.****WHETHER A BAR.**

1. Certain county bonds issued on a subscription by the county to the stock of a railroad company were placed in the hands of a custodian to be delivered to the company upon certain conditions in respect to the performance of work on the road. The company having incurred a debt for work done, gave an order on the custodian of the bonds for a sufficiency of them to pay the debt, and that order was assigned to a third person. Where a suit was instituted for the purpose of settling conflicting claims for the county bonds, to which the holder of the order of the railroad company was a party, and it was determined therein that he was not entitled to the bonds under the order, because at that time the condition upon which the bonds were to be delivered to the company—the doing of work on the road within the county—had not been performed, it was *held*, the adjudication in that suit, adverse to the holder of the company's order, was not a bar to a subsequent suit by him to enforce his claim of the same character, on the basis that after that adjudication the company did do work upon

**FORMER ADJUDICATION. WHETHER A BAR. Continued.**

the road within the county, and thereby performed the condition upon which the bonds were deliverable. *Thomas v. County of Morgan et al.* 479.

2. *Effect of a judgment on an appeal from a county court, prematurely taken, in a proceeding respecting a public road.* See **APPEALS**, 6.

**FORMER DECISIONS.****CHATTEL MORTGAGES.**

1. The authority of the case of *Hathorn et al. v. Lewis*, 22 Ill. 895, in so far as it is held that a chattel mortgage, although wanting in some of the essentials required by the statute, is nevertheless valid and binding as to subsequent purchasers with knowledge, is much shaken, if not entirely overruled, by subsequent decisions of this court, particularly that of *Frank v. Miner*, 50 Ill. 447. *Lemen et al. v. Robinson*, 115.

**CREATING A DEBT AGAINST A CITY.**

2. *Validity of the act of 1867, "to establish a police force for the city of East St. Louis."* The decisions in the cases of *Lovington v. Wider et al.* 53 Ill. 302, and *The People ex rel. Wider et al. v. Cauty*, 55 Ill. 83, holding that the police commissioners of the city of East St. Louis, appointed under the act of 1867, had no power to create a debt against the city, re-affirmed. *City of East St. Louis v. Witts*, 155.

**ADJOURNMENT OF SHERIFF'S SALE.**

3. *Without further notice—whether sale void or only voidable.* Where a sheriff had given the proper notice of a sale of lands on execution, he adjourned the sale for one day, at the instance of the plaintiff in the execution: *Held*, such adjournment did not render the sale void, but only voidable. This rule is in conflict with *Curtis v. Swearingen*, Breese 139; and the facts in the cases of *Thornton v. Boyden*, 31 Ill. 200, and *Botsford v. O'Conner*, 57 Ill. 72, did not require the allusion made in them to a sheriff's sale, and the remark is regarded as *obiter dictum*. *Jackson et al. v. Spink*, 410.

**REMEDIES AGAINST MARRIED WOMEN.**

4. So far as the case of *Mitchell v. Carpenter*, 50 Ill. 470, holds that the remedy against married women in respect to their contracts relating to their separate estates under the statute, is not at law, but only in equity, a question not involved in that case, it is to be regarded as mere *obiter dicta*. *Cookson v. Toole*, 515.

**TAKING PRIVATE PROPERTY FOR PUBLIC USE.**

5. *Who may award the compensation.* The determination of what is "just compensation" for private property when taken for public use, is a judicial act, which can properly be performed only by the judicial department of the government, and former decisions of this court holding the award in that regard, of persons not of the judicial

## FORMER DECISIONS.

TAKING PRIVATE PROPERTY FOR PUBLIC USE. *Continued.*

department, such as the commissioners of the board of public works in the city of Chicago, to be conclusive, are overruled. *Rich et al. v. City of Chicago*, 286.

## FRAUD.

## AS TO THE TIME A FRAUDULENT DESIGN EXISTED.

1. *Whether material.* Where a person sold to another a quantity of flour, for cash, to be delivered by a particular day, and a portion was delivered and paid for previous to that day, and the balance was delivered on the last day for delivery, which was on Saturday, and on its delivery the purchaser drew a check on a bank, but on being presented on the same day, it was dishonored, and the declaration avers that the delivery was obtained by fraud, on a trial in such a case, it is error to instruct the jury that if there was such fraud as would allow the seller to maintain trover or case against the buyer and his partner who held the flour, a design to defraud the seller must have existed when the purchase was made. *Mathews et al. v. Cowan et al.* 841.

## CHECK DRAWN WITHOUT FUNDS.

2. Where a person draws a check on a person in whose hands he has no funds, and who, he has no reason to believe, will honor the check, the drawer is guilty of a fraud, and in such a case as the present, it is error to refuse to so instruct the jury. *Ibid.* 841.

## INFANTS CHARGEABLE WITH FRAUD.

3. Where a minor purchases goods and procures the delivery by fraud, he will be liable as in tort. The mere fact that he made the contract, and by fraudulent means obtained possession of the property, will not shield him from liability to suit, in case or in trover. *Ibid.* 841.

## WHAT WILL AMOUNT TO FRAUD.

4. *Knowledge and intent requisite.* Fraud vitiates every contract, but every false affirmation does not amount to a fraud—a knowledge of the falsity of the representation must rest with the party making it, and he must use some means to deceive or circumvent. *Walker v. Hough*, 875.

## OF THE DEGREE OF PROOF.

5. To justify a court in rescinding a contract, executed by both parties, on the ground that one of the parties was induced to enter into it through fraud practiced by the other, the testimony must be of the strongest and most cogent character, and the case a clear one. *Ibid.* 875.

## FRAUDULENT ORGANIZATION OF A CORPORATION. See CORPORATIONS, 1, 2.

## FRAUD AND CIRCUMVENTION.

## WHAT CONSTITUTES.

1. *In obtaining the execution of a promissory note.* In an action on a promissory note for the sum of \$50.55, brought by an assignee thereof before maturity, against the maker and his surety, there was evidence introduced tending to show that at a public sale had by the payee of the note, the principal maker bought some hedge plants to the amount of \$5.50; that the clerk of the sale wrote the note, and told the defendants at the time they signed it, in the presence of the payee, that it was for the sum of \$5.50 and 5 cents for a stamp, making in all \$5.55; that in belief of such statement of the clerk the defendants signed the note, not knowing it was for the sum of \$50.55, and that they could not read English, the language in which the note was written: *Held*, such evidence tended to make out a case, not merely of fraud relating to the consideration of the note, but of such fraud and circumvention in obtaining its execution as, under the statute, avoided the note in the hands of a *bona fide* assignee before maturity. *Richardson v. Schirtz et al.* 818.

## GARNISHMENT.

## MONEY IN THE HANDS OF SCHOOL DIRECTORS.

1. Certain garnishees answered that they were school directors; that the judgment debtor was employed by them as the teacher of the common school in the district; that there was due him a certain sum of money, but that he had not made out his schedule; that previously the directors and teacher had entered into a special agreement that the directors should make the schedule payable to a third person; that they had no property, means or effects belonging to the teacher, in their hands, except the money earned for teaching, and nothing as individuals: *Held*, upon the facts, on the authority of the ruling in *Millison v. Fisk*, 48 Ill. 112, the money thus in the hands of the directors was not liable to garnishment. *Bivens et al. v. Harper*, 21.

## AFFIDAVIT—BEFORE WHOM SWORN TO.

2. In a garnishee proceeding upon a judgment of the circuit court, it is not necessary that the affidavit, upon which the process is issued, be sworn to before the clerk of the court, but the same may be properly subscribed and sworn to before a justice of the peace. *Horat et al. v. Jackel*, 189.

## FINAL JUDGMENT.

3. *When it may be rendered—act of 1861.* In such a proceeding, upon default of the garnishee, it is error to render final judgment against him at the return term of the writ. A conditional judgment only should be entered, and a *scire facias* issued against the garnishee, returnable to the next term of the court, to show cause why the

**GARNISHMENT. FINAL JUDGMENT. *Continued.***

judgment should not be made final. The act of February 23d, 1861, has not altered the practice in this respect. *Horat et al. v. Jackel*, 189.

**GUARDIAN AD LITEM. See INFANTS, 3, 4.****HEIRS.****WHO INCLUDED THEREIN.**

1. Under the word "heirs" are comprehended the heirs of heirs, *ad infinitum*. *Merrill et al. v. Atkin*, 19.

**JUDGMENT AGAINST ADMINISTRATOR.**

2. *Its conclusiveness.* Where a claim is allowed against an estate in a proceeding in which the administrator is alone a party defendant, while the judgment is conclusive as between the creditor and the administrator, it is not as to the heirs. *Helm v. Cantrell et al.* 524.

**CREDITOR'S BILL.**

3. *Whether it will lie against the heirs of a deceased debtor.* See CHANCERY, 3 to 6.

**HIGHWAYS.****TIME OF MEETING TO HEAR REASONS.**

1. *Construction of an order laying out a public road, as to the time of meeting to hear reasons.* An order laying out and establishing a public road, was dated August 19, 1863. It recited the preliminary steps which had been taken, and then, that on the 6th of July, 1863, the commissioners personally examined the route proposed, and before determining to lay out the road, they fixed upon a time and place for meeting to hear reasons for and against laying out the same, giving eight days' notice thereof, and, having met at the time and place appointed, heard the reasons, and having determined to lay out the road, the commissioners, on the 27th of July, 1863, caused a survey to be made: *Held*, it sufficiently appeared from the order that the commissioners held their meeting to hear reasons for and against laying out the road, within ten days after the expiration of the twenty days from the time of posting up the petition for the road. While it was not explicitly stated when the meeting was had, it might fairly be referred to the immediately preceding date of the 6th of July, which it was admitted was the last one of the required ten days, rather than to the subsequent one of July 27. *Wiley v. Town of Brimfield*, 806.

**OF THE OPENING OF A ROAD.**

2. *What constitutes.* When a common highway is laid out, surveyed and established, through a farm, and before the expiration of five years from that time the commissioners of highways open the fences of the farm so as to make a passway along the line of the road, but as the tenant of the owner of the land had crops growing on the



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#### HIGHWAYS. OF THE OPENING OF A ROAD. *Continued.*

farm, the commissioners gave the tenant permission to put in bars to permit persons to pass until the crops were matured: *Held*, that this was a sufficient opening of the road within five years to prevent it from being vacated under the statute. *Wiley v. Town of Brimfield*, 306.

#### POWER OF THE COUNTY COURT.

3. *To set aside former proceedings.* In a proceeding in a county not under township organization, for the establishment of a public road, the county court has power to vacate the order establishing the road at any time before it is directed to be opened. If, on the damages being assessed, the court believes them to be too high, or that the condition of the county would not justify the expenditure of so large a sum of money, they may reverse and set aside the former proceedings, and refuse to order the road opened. *Boosa v. Henderson county*, 446.

#### OBSTRUCTING A HIGHWAY.

4. *What constitutes.* In a prosecution under the 94th section of the road law, for obstructing and continuing an obstruction, it must be shown that some *act* has been done by the defendant in violation of that section. A mere *omission* to do some act or obey an order of the commissioners of highways, will not warrant a conviction under that section. And where the evidence fails to show that the defendant obstructed the highway, a judgment against him is erroneous. A failure to remove the bars put in the road by his tenant without his consent, or even knowledge, could not render him liable. *Wiley v. Town of Brimfield*, 306.

#### DEFECTIVE STREETS IN CITIES.

5. *Liability of the corporation for injuries.* Chartered cities are liable for injuries, resulting from neglect to keep their streets in proper condition. *City of Centralia v. Scott*, 129.\*

6. *Contributory negligence.* In an action against a chartered city, to recover for injuries received by the plaintiff by reason of being thrown from his wagon in going over a defective crossing, while his horses were running away, it was *held*, the fact, that one of the plaintiff's horses had previously, on several occasions, run away, was not, of itself, a conclusive reason why the plaintiff should not recover. *Ibid.* 129.

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\*See also the cases of *President and Trustees of the Town of Mechanicsburg v. Meredith*, 54 Ill. 84, and *City of Peru v. French*, 55 Ill. 317. And see the case of *Town of Wallham v. Kemper*, 55 Ill. 346, where a distinction is taken in regard to their liability for injuries, resulting from the bad condition of highways, between chartered cities, and towns established by law as a civil division of a county, merely.

# HIGHWAYS. DEFECTIVE STREETS IN CITIES. *Continued.*

7. Such circumstance was properly left to the jury for them to consider, and weigh it in connection with the alleged negligence of the defendant, and in determining the degree of the plaintiff's care or negligence in driving his team. *City of Centralia v. Scott*, 129.

## APPEALS FROM COUNTY COURTS TO CIRCUIT COURTS.

8. *How far the action of the county courts on the subject of highways is subject to review.* See APPEALS, 2 to 6.

DEDICATION. See DEDICATION.

# HOMESTEAD.

## OF THE MODE OF RELEASE.

1. Where a husband and wife execute a mortgage upon lands to which a homestead right has attached, a release or waiver of such right can not be effected by the officer's certificate of acknowledgment alone. There must be a formal release or waiver of the statute, signed by the party releasing. *Hutchings et al. v. Huggins*, 29. ✓

## ABANDONMENT.

2. *Effect thereof.* It is not essential to the waiver of the homestead right that there should be a formal release thereof in writing, but the right may be lost by an abandonment of the premises. *Vasey v. Board of Trustees, etc.*, 188. ✓

3. The husband, as the head of the family, has the right to control the residence of his wife and children. Where the husband, with his family, abandons the premises to ruin, and locates elsewhere, he ceases to occupy them as a residence, and such occupancy is necessary to the existence of the homestead right. *Ibid.* 188.

4. So, where the owner of land, which he occupied as a homestead, executed a mortgage thereon, but without releasing the homestead right formally in writing, and afterwards abandoned the premises without intending to return to them, this was held to be such a waiver of the homestead in favor of the mortgagee, that a subsequent conveyance of the premises by the mortgagor, with a formal release of the homestead right, in writing, would not operate to pass any right to his grantee, in respect to the homestead, which could be asserted against the mortgage. *Ibid.* 188.

INDICTMENT. See CRIMINAL LAW, 1, 2.

# INFANTS.

## AS THE WARDS OF A COURT OF CHANCERY.

1. The rights of infants will always be guarded by a court of equity, and whenever invaded or endangered, a remedy will be applied. *White et al. v. Glover*, 459.

INFANTS. *Continued.*

## DEFAULT AGAINST INFANTS.

2. A default can not be taken against infant defendants in chancery, nor can a decree be rendered against them without proof. *Thomas, trustee, etc. v. Adams et al.* 228.

## CAN ONLY APPEAR BY GUARDIAN.

• 3. *Or guardian ad litem.* It has been held that a minor can only appear to defend a suit by guardian, and not in person or by attorney. *Kesler et al. v. Pennington*, 184.

4. It is clearly the duty of courts to appoint a guardian *ad litem* for minor defendants, when there is not a guardian appearing and defending for them. And in such a case it is error to proceed to trial without appointing a guardian *ad litem*. *Ibid.* 184.

## PARTITION OF LANDS OF INFANTS.

5. *Whether it will be made—a court of chancery the guardian of infants.* See PARTITION, 1, 2, 3.

## LIABILITY FOR TORTS.

6. Infants are liable for torts and wrongs committed by them, the same as adults. *Wilson v. Garrard*, 51.

## WHETHER CHARGEABLE WITH FRAUD. See FRAUD, 3.

## INJUNCTIONS.

## WHETHER THE PROPER REMEDY.

1. *To prevent a wrongful act.* A court of chancery will not assume jurisdiction to restrain a mere breach of the peace, or ordinary trespass, where the resulting injury is not, in its nature, irreparable. *Hamilton v. Stewart et al.* 830.

2. So a person who owns, or claims to own, certain things placed in a building as fixtures, while he can not lawfully enter with force upon the possession of another to reclaim his property, may resort to the writ of replevin to obtain possession. Nor would the fact that the claimant was insolvent, change the right. The party resorting to such a writ would, before it could be executed, have to give bond as required by the statute, and hence it would be error to enjoin the bringing of such a suit. *Ibid.* 830.

3. Where a party threatens to commit a breach of the peace, the other party can resort to criminal proceedings, and have the party making the threats bound to keep the peace as to person and property. Such threats would not give a court of equity jurisdiction to restrain the party. *Ibid.* 830.

## RESTRAINING A MUNICIPAL CORPORATION.

4. *When it may be done, and when not.* See CORPORATIONS, 3, 4, 5.

INJUNCTIONS. *Continued.*

## STATE AND FEDERAL COURTS.

5. *Neither can interfere with the process of the other.* See CONFLICT OF LAWS, 1, 2.

## DISSOLUTION OF INJUNCTIONS.

6. *In what manner effected—striking cause from the docket.* A suit restraining by injunction the collection of a judgment was commenced and the writ served in June or July of 1857. The case was continued, from term to term, until the September term of 1862, when the following order was made: "Ordered, that this cause go off the docket." On the 14th of March, 1867, execution issued upon the judgment and was levied on property of the debtor, and a sale thereof made on the 13th of April following: *Held*, the order striking the case from the docket, acquiesced in, and no attempt made to reinstate the case, was a virtual dissolution of the injunction. *Gold v. Johnson*, 62.

## ASSESSMENT OF DAMAGES ON DISSOLUTION.

7. *Suggestions in writing.* To confer jurisdiction on the court to hear evidence and assess damages, on the dissolution of an injunction, suggestions in writing should be filed, stating the nature and amount of damages claimed. The plaintiff should thus have notice of the claim set up against him, and it is error to make the assessment without such suggestions. *Hamilton v. Stewart et al.* 330.

8. *Evidence to be preserved.* In assessing damages in such cases, it is necessary that the evidence heard on the assessment should be preserved in the record as in other chancery proceedings, and failing to preserve the evidence in the record, there is nothing to sustain the decree for damages, and it will be reversed. *Ibid.* 330.

## INSTRUCTIONS.

## OF THEIR QUALITIES.

1. An instruction which informs the jury that if they find certain facts, which, if true, constitute a defense, to be true, then they should find the issue in a particular manner, does not find the facts, and is unobjectionable. *Bartlett et al. v. Board of Education*, 364.

2. Where an instruction asserts a correct legal proposition, applicable to the facts of the case, it is proper for the court to give it; and if the other party desires to have its operation limited to a particular point in the case, he should ask an instruction for the purpose. *Ibid.* 364.

3. *Need not set forth every element of the case.* In an action to recover damages resulting from the alleged negligence of the defendant, it is held that in such an action it is not an unusual, nor is it an objectionable, practice, where the plaintiff's counsel desires an instruction

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

as to the rule of damages, to say to the jury that, if they find from the evidence that the defendant is guilty, as charged in the declaration, then the plaintiff is entitled to recover, and to define the measure of damages. *Chicago, Burlington & Quincy Railroad Co. v. Payne, Admr.*, 584.

4. Such a mode obviates the necessity of stating, and perhaps, reiterating, hypothetically, each element of the cause of action, before coming to the real point in the instruction. *Ibid.* 584.

5. *Should be based on the evidence.* Instructions should not be based on suppositions, in support of which there is no evidence. *Cotton v. Holiday*, 176.

## INSURANCE.

## LIFE INSURANCE.

1. *Renewal receipt—whether a new contract.* Where a policy is issued to insure the life of a person for the term of life, in consideration of the premium paid, and to be paid annually during its continuance, a receipt given for the annual premium, and which recites that the policy was thereby continued in force for another year, does not constitute a new contract, but merely operates to continue the old one. *Mutual Benefit Life Ins. Co. v. Robertson*, 123.

2. *Effect of misrepresentation.* The wife of the party whose life was insured, and for whose benefit the policy was obtained, stated to the agent of the company at the time of procuring such a renewal receipt, in answer to his inquiry on the subject, that her husband, who was absent in another State, had written to her and that he was in his usual health: *Held*, in an action on the policy, the statement being verbal, and not referred to in the policy, should be deemed to have been a mere representation. It was independent of the contract, and collateral to it. It may have been untrue, and yet not avoid the policy. To give it that effect it must be proved to have been material, and that it induced the risk. *Ibid.* 123.

3. But even the failure to communicate a material fact, unknown to the assured, will not vitiate a policy. The undertaking is merely to represent, truly, facts within the knowledge of the assured. *Ibid.* 123.

## OF A WARRANTY BY THE ASSURED.

4. A warranty is in the nature of a condition precedent; it must appear on the face of the policy; or, if on another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty can not be created nor extended by construction. *Ibid.* 123.

INSURANCE. *Continued.*

## ALLEGATIONS AND PROOFS.

5. In an action upon a policy of life insurance, the introduction of the policy, and receipts for the annual premiums required by its terms to be paid, and proof of the death of the party whose life is insured, will make a *prima facie* case in favor of the plaintiff. He is not bound to set out the application and prove its truth. *Mutual Benefit Life Ins. Co. v. Robertson*, 123.

## INTEREST.

## IN MATTERS OF ACCOUNT BEFORE A MASTER.

1. Where a matter of account is referred to a master, without directions from the court, he can not, in computing interest, make rests; but there are some exceptions to the rule of practice. Where the facts stated in the bill, and taken to be true by the default, require rests in computing interest, and they are allowed by the master without objection, and the report is confirmed, the objection can not be raised in this court. *Hurd v. Goodrich*, 450.

## TRUSTEE—COMPOUND INTEREST.

2. A trustee is only chargeable with compound interest where he has been guilty of gross negligence, as when the trustee has used the money of the *cestui que trust* for his own purposes, and, it is presumed, with profit. *Ibid.* 450.

## JOINT RIGHTS AND INTERESTS.

## JOINT PURCHASES FOR PURPOSES OF SALE.

1. *Within what time a sale should be made.* Where two persons purchase land, as tenants in common, to be sold and the profits divided, and no time is agreed upon in which the sale is to be made, the law will require a sale in a reasonable time. *Smith v. Gear*, 881.

2. *Of the rule for dividing the proceeds—and adjustment of the rights of the parties.* Where parties were purchasing stock, and one furnished money therefor, and the other to have half of the net profits when sold, and the parties purchased notes, secured by mortgage on lands, and it was agreed that the notes and mortgage were to be held by them in the same manner that they held the stock, and the mortgage was foreclosed, and the land purchased by the party who furnished the money to buy the stock, in his name, it would be error to decree one-half of the land to the person who was to have but one-half of the net profits. *Ibid.* 881.

3. In such a case, it is not necessary to prove that there would be profits on a sale of the lands before the court would render a decree of sale, as it was the agreement of the parties that there should be a sale. But the chancellor might provide that the land be offered for

## JOINT RIGHTS AND INTERESTS.

JOINT PURCHASES FOR PURPOSES OF SALE. *Continued.*

sale, and if a sum sufficient to yield a profit should not be bid, order that it be withdrawn, and the decree ordering the sale be set aside, and dismiss the bill. *Smith v. Gear*, 381.

4. In such an event, if anything should be found due to the other party, who was to receive net profits, he would have a lien on the land for the same, and if not paid, the land should be sold to pay the same. *Ibid.* 381.

5. In such a case it is error to order the property to be sold, and to reserve the question as to the equities of the parties until the coming in of the master's report. *Ibid.* 381.

6. In such a case the party only entitled to share in net profits did not acquire a lien against the land by purchasing in an outstanding tax title and the equity of redemption, without the consent of the other party. In such a case as this, he had the right to make the purchase if he believed their rights were jeopardized; but so long as he claimed an interest in the contract, he could not purchase and set up an outstanding title. He could tender the title to the other party, and if he refused to assent to the purchase in aid of his title, for their mutual benefit, and allow what they cost or their reasonable value, the former could abandon his claim under the contract, and could use such a title adversely to the other party. *Ibid.* 381.

7. In a case like this, after a reasonable time had elapsed, by use of ordinary diligence, for making a sale of the property, and it had not been sold, it was competent for the party not holding the title to file a bill to compel the property to be offered for sale, and if a sale could not be so made, and the party only having an interest in the profits failing to release his interest in the property on having any sum due him refunded, it would be competent for the other party to file a bill to have the claim of the party having an interest in the profits extinguished, and neither party would be bound to wait an unreasonable time. *Ibid.* 381.

## JUDGMENTS.

## CONFESSION OF JUDGMENT.

1. *Presumption as to proofs.* Where a court of general jurisdiction receives the confession of a judgment, the presumption will be indulged that the court heard evidence that the claim was due, and proof of the execution of the power to confess the judgment. Such evidence need not be preserved in the record. *Osgood v. Blackmore*, 261.

2. *Warrant of attorney—description of the note.* When a power of attorney is written on the same paper and below the note, and refers  
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JUDGMENTS. CONFESSION OF JUDGMENT. *Continued.*

to the "foregoing note," and describes it correctly except as to the time when it was to begin to draw interest, the description is sufficient to identify the note, and the presumption is, the judgment was confessed on the note as authorized by the power of attorney. Such a case is not the same as where the judgment is confessed on a note entirely different in date from that described in the power of attorney. The case of *Chase v. Dana*, 44 Ill. 262, considered and distinguished. *Osgood v. Blackmore*, 261.

## JUDGMENT ON ADMINISTRATOR'S BOND.

3. *Its extent.* In an action upon an administrator's bond, the formal judgment in debt need not be for the full penalty of the bond. *Pinkstaff et al. v. The People*, *use, etc.* 148.

## JUDGMENT IN REPLEVIN.

4. *Its requisites.* A judgment in replevin, awarding a writ of *retorno habendo*, will not be regarded as too general in the description of the property, if it follow the declaration in that regard. *Lammers v. Meyer*, 214.

## ON CONDEMNING RIGHT OF WAY.

5. *Judgment against railroad under act of 1852—for damages accruing to the owner of lands by the construction of the road—of the form thereof.* The form of the judgment, where a recovery is had under the act of 1852, should conform to that prescribed by section 15 of the act. *Wilson v. The Rockford, Rock Island & St. Louis Railroad Co.* 273.

## AGAINST AN ESTATE.

6. *Effect of the two years limitation on the character of the judgment.* See ADMINISTRATION OF ESTATES, 6.

## JUDICIAL ACTION.

## IN AWARDING COMPENSATION.

1. *When private property is taken for public use.* The determination of what is "just compensation" for private property when taken for public use, is a judicial act, which can properly be performed only by the judicial department of the government, and former decisions of this court holding the award in that regard, of persons not of the judicial department, such as the commissioners of the board of public works in the city of Chicago, to be conclusive, are overruled. *Rick et al. v. The City of Chicago*, 286.

## JUDICIAL SALES. See SALES, 1 to 8.

## JURISDICTION.

## PRESUMPTION.

1. The presumption is in favor of the jurisdiction of a court of general jurisdiction, without the facts appearing in the record; on



**JURISDICTION. PRESUMPTION. Continued.**

the other hand, there is no presumption in favor of the judgment of a court of inferior and limited jurisdiction; but the facts must appear in the record, showing the jurisdiction. Nor can the judgment of a court of general jurisdiction be attacked in a collateral proceeding by extrinsic evidence. If it appear from the record in the case that the court did not or could not have had jurisdiction of either the subject matter or the person of the defendant, then the presumption in favor of the judgment would be overcome. *Osgood v. Blackmore*, 261.

**COURT OF COMMON PLEAS OF CITY OF SPARTA.**

2. *Its territorial jurisdiction.* See SPARTA, COURT OF COMMON PLEAS OF, 1.

**JURY.****TRIAL BY JURY.**

1. *Of the right thereto—in respect to the taking of private property for public use.* Where a city charter, granted prior to the adoption of the constitution of 1870, gave to the common council of the city, and the board of public works, power to assess damages on the condemnation of land for the widening of a street, and it was objected that the act was unconstitutional, because the owner was deprived of a jury: *Held*, that as the court had, in previous decisions, sustained the law, the rule *stare decisis* must be applied, and as the constitution of 1870 requires a trial by jury in all future cases, the question is not of any practical importance to determine whether a jury was indispensable, and that rights acquired under former proceedings should be protected. *Rich et al. v. City of Chicago*, 286.

**MUST DECIDE FACTS.**

2. *Not the court.* An instruction is properly refused which purports to take the case, when there is a conflict of testimony, away from the jury, by telling them how to find their verdict. *Chicago, Burlington & Quincy Railroad Co. v. Payne, Adm'r*, 534.

**FINDING A VERDICT BY COMPROMISE.**

3. Where a jury in their retirement, in considering their verdict, as appeared from the affidavit of the officer having them in charge, after agreeing to find for the plaintiff, but differing widely as to the amount of damages, agreed that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and put the slip in a hat, and that the sum obtained by adding the amounts together and dividing by twelve, should be their verdict, which was done, and a verdict returned accordingly: *Held*, that while jurors may resort to such a process as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement, that such a result shall be their verdict, will vitiate a verdict found

**JURY. FINDING A VERDICT BY COMPROMISE. *Continued.***

under and by virtue of such an agreement; and although one of the jurors swore there was considerable consultation after the process, and that each juror agreed upon the result thus reached as his verdict, it was still regarded that the verdict had been found under the pressure of the agreement. *Illinois Central Railroad Co. v. Able*, 131.

**LACHES.** See **LIMITATIONS**, 5.

**LETTER OF CREDIT.****EXTENT OF LIABILITY THEREON.**

1. A bank gave a letter of credit to a person, guaranteeing the payment of drafts which might be drawn by the latter on a firm named in the letter, to the amount of \$14,000, the letter providing that endorsements might be made thereon. The person to whom the letter was given, made a draft for \$6000, which was endorsed on the letter. He then drew for \$2000, which was also endorsed on the letter. This draft was forwarded for collection to the bank giving the guaranty, which was advised by letter that it was drawn under the letter of guaranty. The holder of the letter then made a draft for \$4000, which was not endorsed on the letter, nor, in sending the bill for collection to the same party as before, was any reference made to the letter of guaranty; but the draft was paid by the drawees. He then drew for \$6000, the draft purporting on its face to be drawn against the letter of credit, which was returned to the bank which gave it, with this draft, for collection. This last draft was protested. All the drafts except the first were drawn in favor of the same party. In a suit by the latter upon the guaranty, to recover the amount of the draft for \$6000, which was protested, it was *held*, the defendant was not liable, because, on the payment of the previous drafts, amounting to \$12,000, it was exonerated from liability on its guaranty, except to the extent of \$2000, the residue of the amount guaranteed. *Omaha National Bank v. First National Bank of St. Paul*, 428.

2. However different the rule might have been had the last draft been sold to a person who had no knowledge of the prior draft for \$4000, which was not endorsed on the letter of credit, and who should purchase on the faith of that letter, yet, in the case of the plaintiff, who had knowledge thereof, the omission of such endorsement could not avail to charge the guarantor beyond the amount specified in its letter of credit. *Ibid.* 428.

**LEVY.****LEVY UPON REALTY.**

*Whether a satisfaction—and herein, of a second execution pending such levy.* A levy of an execution on real estate of value sufficient to satisfy it, does not, like a levy on personal property, operate while the

LEVY. LEVY UPON REALTY. *Continued.*

levy is undisposed of as such a satisfaction of the judgment as would be a bar to any attempt to enforce the collection of the judgment in any other way. The fact that such a levy has been made, does not affect the validity of the purchaser's title to other lands of the debtor, sold under an execution subsequently issued. *Gold v. Johnson*, 62.

## LICENSE.

## TO PASS OVER THE LAND OF ANOTHER.

1. In an action for the trespasses of the defendant's children in passing over the land of the plaintiff, in going to and returning from school, it appeared the school house was built by and for the public, on a small lot forming a part of the tract owned by the plaintiff. It was *held*, even if there was a highway to the school house, it appearing, from the evidence, that the defendant's children were permitted by the plaintiff to pass over his land for four or five years, without objection, the jury had the right to infer therefrom a license, which could not be revoked without notice. *Wilson v. Garrard*, 51.

## TO USE A WALL OF A BUILDING.

2. *Whether revocable.* Where the owner of a lot of ground contemplated the erection of a frame building thereon, the owner of a brick house situated on the line of an adjacent lot proposed to him that if he would build of brick he might use the brick wall of the house for the purpose of attaching thereto the proposed new building. The proposition was accepted, and the new house was built of brick and attached to the wall of the other building, as suggested: *Held*, that while the license to use and attach to the wall might have been revoked prior to the execution of the purpose of the license, yet, after its execution by the expenditure of money in the erection of the new building, as induced by the permission, the license was irrevocable. *Russell v. Hubbard et al.* 385. ✓

3. *Of the rights of grantees of the respective parties.* The party to whom the license was granted having availed thereof by the erection of his building and attaching to the wall as proposed to him, his subsequent grantee would succeed to his equitable rights in respect thereto. *Ibid.* 385.

4. And the party granting the license being estopped from its revocation by reason of its being executed, the conclusive effect of the estoppel would embrace privies as well as parties, and preclude all who claim under the person originally barred. *Ibid.* 385.

## STATUTE OF FRAUDS.

5. And in such case, the execution of the parol permission would supply the place of a writing, and take the case out of the statute of frauds. *Ibid.* 385.

## LIENS.

### CREDITOR OF AN ESTATE.

*Character of his lien upon the realty.* See CHANCERY, 6.

LIFE INSURANCE. See INSURANCE, 1 to 5.

## LIFE TABLES.

### WHETHER JUST IN THEIR APPLICATION.

1. While life-tables may be resorted to, they can afford but a mere expectancy of the continuance of the particular life. They are, doubtless, correct in the aggregate, but can not be when applied to individual cases. *Hartmann et al. v. Hartmann*, 103. See PARTITION.

## LIMITATIONS.

### LIMITATION ACT OF 1839.

1. *Of payment of taxes by an adverse party after the bar is complete.* Where a party has paid taxes on land, under color of title, for seven successive years, and possession has followed or accompanied such payment of taxes so as to create a bar under either the first or second section of the limitation act of 1839, then such bar will not be interrupted by the subsequent payment of taxes by the holder of the paramount title. *Harpham et al. v. Little*, 509.

### AS TO THE SEVERAL ITEMS OF AN ACCOUNT.

2. Where all the items of an open, unliquidated account are on one side, the last item happening to be within the period fixed by the statute of limitations barring an action on the account, will not draw after it those that are of longer standing, so as to protect them from the operation of the statute. *Reeves v. Herr, Exor.* 81.

### FORCIBLE ENTRY AND DETAINER.

3. The action of forcible entry and detainer in England, from whence we derive it, was a criminal proceeding, and a prosecution was barred in three years after the right of action accrued. But in this State the action has been changed by express law, from a criminal to a civil proceeding, and no express limitation has been furnished. This was doubtless a *casus omissus* on the part of the legislature. *Thompson v. Sornberger*, 326.\*

### OF A NEW PROMISE.

4. *Whether availing.* One partner executed a note in the name of the firm, after dissolution, and without the knowledge of the other partner, for a prior account due from the firm, and the note thus given

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\* The 15th section of the act of April 4, 1872, (in force July 1, 1872,) provides: "All civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." *Sess. Laws*, p. 359; *Gross' Comp.* vol. 2, p. 258.

**LIMITATIONS. OF A NEW PROMISE. *Continued.***

was assigned by the payee to a third person, who was a mere volunteer, and without any assignment of the original indebtedness. In a suit by such assignee, against the representatives of the partner who did not concur in the making of the note, to compel its payment, it was *held*, that if the original debt became barred by the statute of limitations, as it would in five years, no new promise would revive and make it available in the hands of the plaintiff. *Helm v. Cantrell et al.* 524.

5. *Effect of the note as against the partner who was not bound by it.* In such case, the original indebtedness being barred, the giving of a note therefor, in the name of the firm, by one of the partners alone, would not operate as a renewal or continuation of the debt as against the other partner, who was not bound by the note. *Ibid.* 524.

**LAPSE OF TIME ASIDE FROM THE STATUTE.**

6. *Setting aside sheriff's sale.* Even if inadequacy of consideration alone afforded a sufficient ground to authorize a court of equity to set aside a sheriff's sale of land, yet a delay of seventeen years in seeking the relief, while unexplained, would prevent the action of the court in that regard. *Pickering v. Driggers*, 65.

**CLAIMS AGAINST ESTATES.**

7. *Of the two years' limitation—the judgment.* See ADMINISTRATION OF ESTATES, 6.

**LOTTERY.** See CRIMINAL LAW, 4, 5, 6.

**MALICIOUS MISCHIEF.**

**WHAT CONSTITUTES.** See CRIMINAL LAW, 8.

**MARRIED WOMEN.****OF REMEDIES AGAINST THEM.**

1. *Upon contracts in respect to their separate property—whether at law or in equity.* So far as relates to the engagements of a married woman, not within the capacity to contract given, by implication, by the act of 1861, the remedy, when a proper case exists, must be sought under the rules in relation to the general contracts of married women and their binding effect upon their separate estates, in equity, as under the old forms of settlement before the statute, because, in that case, the implication of capacity to bind her separate estate arises only in equity. *Cookson v. Toole*, 515.

2. But the implication of capacity to contract in respect to her separate property arising under the statute, is an implication of law, and being an implication of law, and not of equity, the capacity to contract within the scope of the implication is a legal capacity, and

**MARRIED WOMEN. OF REMEDIES AGAINST THEM. Continued.**

all contracts under it are legal contracts, cognizable by courts of law. *Cookson v. Tools*, 515.

8. So it is *held*, that an action at law will lie against a married woman to recover for work and labor done and performed at her request, in and about the improvement and cultivation of her farm, and in taking care of her stock thereon, such farm and stock being her sole and separate property, owned and held by her under the provisions of the act of 1861. *Ibid.* 515.

4. *Former decision.* So far as the case of *Mitchell v. Carpenter*, 50 Ill. 470, holds that the remedy against married women in respect to their contracts relating to their separate estates under the statute, is not at law, but only in equity, a question not involved in that case, it is to be regarded as mere *obiter dicta*. *Ibid.* 515.

**MISTAKES IN DEEDS BY MARRIED WOMEN.**

5. *Can not be corrected in chancery.* See **CHANCERY**, 10.

**SERVICE OF PROCESS UPON A MARRIED WOMAN.**

6. *Or whether service upon the husband is sufficient.* See **PROCESS**, 1, 2, 8.

**MEASURE OF DAMAGES.****AS AGAINST CORPORATIONS AND INDIVIDUALS.**

1. When a corporation inflicts an injury upon a person, they can be required to compensate him for the wrong sustained only to the same extent that would be required of an individual engaged in the same business. The same rules apply to them as to individuals. *Illinois Central Railroad Co. v. Nelson*, 110.

**FOR INJURY TO A REVERSIONARY INTEREST.**

2. Where a reversioner sues for injury to the freehold, he must be restricted to damages to the reversionary interest, and it would be error to give an instruction which would authorize a verdict for all damages sustained, as well by the tenant in possession as the landlord. Each has his remedy: the former for injury to his possession, the latter for injury to his reversion. *Cooper v. Randall et al.* 317.

**FOR INJURY AFTER SUIT BROUGHT.**

3. Where a party sues for injury to his property occasioned by the deposit thereon of dust, smut, etc., from a mill erected on adjacent premises, it would be error to permit proof that dust was thrown on the building after suit was brought, as a means of measuring damages for injuries sustained thereby prior to that time. *Ibid.* 317.

**ON CONDEMNING RIGHT OF WAY.**

4. *Under act of 1852.* See **RIGHT OF WAY**, 5 to 8.

## MINUTES OF A JUDGE.

NO PART OF THE RECORD. See CRIMINAL LAW, 2.

## MISTAKE.

REFORMING A DEED IN CHANCERY.

*So as to affect the rights of a married woman.* See CHANCERY, 10.

## MORTGAGES.

## CHATTEL MORTGAGES.

1. *Of possession by mortgagor after maturity of the debt.* Where a chattel mortgage provided that the mortgagor should retain possession of the property until default in payment of the debt it was given to secure, and more than two months after the debt matured, the property still continuing in his possession, he sold and delivered to a third person, and no reason appeared why possession was not taken by the mortgagee at the proper time, it was held, the purchaser took the property free from any lien of the mortgage, even though he had actual notice that it was still unsatisfied. *Lemen et al. v. Robinson*, 115.

2. *Former decision.* The authority of the case of *Hathorn et al. v. Lewis*, 22 Ill. 395, in so far as it is held that a chattel mortgage, although wanting in some of the essentials required by the statute, is nevertheless valid and binding as to subsequent purchasers with knowledge, is much shaken, if not entirely overruled, by subsequent decisions of this court, particularly that of *Frank v. Miner*, 50 Ill. 447. *Ibid.* 115.

## SUBSEQUENT PURCHASER FROM ADMINISTRATOR OF MORTGAGOR.

3. *Sale of a part of mortgaged premises by administrator of mortgagor—such part only secondarily liable.* Where the administrator of a deceased mortgagor obtains an order of the probate court for the sale of a portion of the mortgaged premises, to pay debts other than that secured by the mortgage, which have been allowed against the estate, the residue of the mortgaged premises remaining to the heirs of the mortgagor must be first resorted to for the satisfaction of the mortgage, that portion held by the purchaser at the administrator's sale being only secondarily liable. *Moore v. Chandler et al.* 466.

4. In that regard, the purchaser at the administrator's sale, and the heirs of the mortgagor, hold the same relation to each other that would have existed between the mortgagor himself and his grantee, in case the former had sold and conveyed a part of the mortgaged premises in his life time, and their respective rights are governed by the case of *Iglehart v. Crane & Wesson*, 42 Ill. 261. *Ibid.* 466.

5. *Sale on execution against the heirs.* And where the interest of a portion of the heirs had been sold under execution against them, prior to the sale by the administrator, the purchaser at the execution sale would stand in no better position than the heirs themselves, whose interests had thus been sold. *Ibid.* 466.

## MORTGAGES.

SUBSEQUENT PURCHASER FROM ADMINISTRATOR OF MORTGAGOR. *Continued.*

6. *Of applying the residus of the proceeds of the administrator's sale in satisfaction of the mortgage.* There remained in the hands of the administrator of the mortgagor a surplus fund, arising principally from the sale of the portion of the mortgaged premises. This could not, however, be applied to relieve the land purchased at the administrator's sale from its ultimate liability to the mortgage, the debt secured thereby never having been allowed against the estate, and the time having passed when it could be so allowed. The general property of the estate being thus discharged from the payment of the mortgage debt, it could only be enforced against the mortgaged premises. *Moore v. Chandler et al.* 466.

## OF A DEED ABSOLUTE IN FORM.

7. *Whether a mortgage.* The doctrine is well settled that a deed, absolute in terms, if intended to secure an indebtedness, is a mortgage, whether the intention is manifested by a written defeasance, by parol declarations, or by the acts of the parties. *Price et al. v. Karnes*, 276.

8. Where a deed is absolute on its face, the proof should be clear before a court would hold it a mortgage, and decree a foreclosure or a redemption. *Ibid.* 276.

9. A party sold another twelve lots of ground adjoining the city of Chicago, by a conditional agreement, and \$3300 was paid, giving the purchaser the option, on seeing the property, if not satisfactory, to decline to hold it, and have the money returned. Subsequently, and in July, 1867, and about one month afterward, the same grantor sold to the grantee twelve other lots in the same tract of land for \$3900; \$756 was paid, and notes given for the balance, \$1900 was paid in August, and in the same month the twenty-four lots were conveyed to the purchaser by a warranty deed. This evidenced a purchase, and where the evidence is conflicting and unsatisfactory, it was proper for the court to refuse to decree the transaction a mortgage, and to refuse permission to redeem as from a mortgage. *Ibid.* 276.

10. In this case it is held, upon the facts, that a deed, absolute in form, was intended by the parties to have effect accordingly, and that the transaction showed nothing of the character of a loan, or of the relation of debtor and creditor. *Alwood v. Mansfield et al.* 496.



**MORTGAGES. Continued.**

**OF AN INTERVENING INCUMBRANCER.**

11. *Where a vendor of land accepts the notes for the purchase money, and a mortgage on the premises from a second purchaser, the first purchaser having given a mortgage to a third person prior to such transaction.* See CONVEYANCES, 2, 3, 4.

**MUNICIPAL CORPORATIONS.**

**INJURIES FROM DEFECTIVE HIGHWAYS.**

- Liability of cities.* See HIGHWAYS, 5, 6, 7.

**CREATING A DEBT AGAINST A CITY.**

- By whom.* See CONSTITUTIONAL LAW, 1; and see CORPORATIONS, 5.

**NEGLIGENCE.**

**THE RULE AS TO CONTRIBUTORY NEGLIGENCE.**

1. The doctrine, that any contributory negligence by the party injured, no matter how slight when compared with that of defendant, will defeat a recovery in an action for damages resulting from the negligence of the defendant, has often been repudiated by this court. The rule is, that negligence, resulting in injury, is comparative, and it is not required that the plaintiff shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if it appear the defendant was guilty of a higher degree of negligence. *Chicago, Burlington & Quincy Railroad Co. v. Payne, Admr.*, 584.

2. *Where a passenger leaves a railroad train while it is in motion.* See RAILROADS, 2, 3.

3. *In respect to injuries received upon a defective highway.* See HIGHWAYS, 5, 6, 7.

**NEGLIGENCE IN RAILROADS.**

4. *As to the manner of approaching crossings.* In an action against a railroad company to recover damages for injuries occasioned by the alleged negligence of the defendant's servants in the manner of running its trains, it appeared the accident occurred at a road crossing near a populous city, the party injured attempting to cross the railway track in a buggy, which was struck by the passing train. The crossing was of a dangerous character, and there was evidence sufficient for the jury to find that the servants of the company having the control of the particular train which did the injury, were well aware of that fact. It was *held*, if this were so, and there was evidence tending to show that they ran the train without the use of steam, upon a down grade, in a

# NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

comparatively noiseless manner, and at a rapid rate of speed, without sounding the whistle or ringing the bell after they passed the whistle post, 80 rods from the crossing, when they had every reason to suppose that persons would be passing over the track on the highway, without opportunity of seeing the approaching train, then these facts were sufficient to warrant the jury in inferring recklessness of life and limb on the part of such servants, and that they were actuated by general malice and criminal misconduct, or very gross negligence. *Chicago, Burlington & Quincy Railroad Co. v. Payne, Admr.* 534.

5. *Duty as to the safety of road crossings.* A railroad company is under the statutory duty, in the construction of its road across a public highway, to restore the highway to its former state, or in a sufficient manner not to impair its usefulness. And if a highway can be restored in a manner not to impair its usefulness only by constructing the highway over the railway, it is the duty of the company to so restore it, and the omission is a breach of duty. *Ibid.* 584.

6. It is not the duty of the highway authorities, but of the railway company, to give such protection from peril caused by the railway at highway crossings. *Ibid.* 584.

## REMOTE AND PROXIMATE CAUSE.

7. *Of the rule and its application.* If fire is communicated from a railway locomotive to the house of A, and thence to the house of B, it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B, but that is a question of fact, to be determined in each case by the jury under the instructions of the court. *Fent et al. v. Toledo, Peoria & Warsaw Railway Co.* 349.

8. The rule is, to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. *Ibid.* 349.

9. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible. *Ibid.* 349.

**NEGLIGENCE. REMOTE AND PROXIMATE CAUSE. *Continued.***

10. In this case, which was an action against a railway company to recover for the loss of the plaintiff's house by fire, alleged to have been occasioned by the negligence of the company, it appeared that a locomotive, with a train of freight cars, belonging to the defendant, in passing eastwardly through a village, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of plaintiff, situated about two hundred feet from the warehouse, and destroyed it. It was *held*, the company was not exonerated from liability merely because the plaintiff's house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house. The case was one calling for the application of the rule before announced, the liability of the company depending upon the question whether the second house was so near the first that, in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected. *Fent et al. v. Toledo, Peoria & Warsaw Railway Co.* 349.

11. *How the rule affected by the extent of the loss to the wrong doer.* The propriety of the rule for determining what is a proximate cause of the injury in such a case, can not be affected by considerations as to the extent of liability to which railway companies might be thereby subjected, even to producing bankruptcy, and compelling them to suspend their operation. *Ibid.* 349.

**WHERE A SURETY SIGNS A BOND ON CONDITION.**

12. *The condition being that the bond shall not be delivered to the obligee until another signs it as surety—duty of the obligee.* See **SURETY**, 2.

**IN RESPECT TO DEFECTIVE STREETS IN CITIES.**

13. *Liability of cities, and of contributory negligence.* See **HIGHWAYS**, 5, 6, 7.

**NEW TRIALS.****EXCESSIVE DAMAGES.**

1. In an action on a promissory note, where the judgment was too large by the sum of eighteen cents, the excess being simply an error in the computation of the amount found to be due on the note, it was *held*, the amount was too trifling to be made a ground for the reversal of a judgment. *Tipton et al. v. Utley*, 25.

**NEW TRIALS. *Continued.*****VERDICT AGAINST THE EVIDENCE.**

2. In this case the verdict of the jury is not sustained by the evidence, and the judgment is, for that reason, reversed. *Kuhner v. Griesbaum*, 48.

3. In this case, in which one of the issues presented the question whether the defendant promised to marry the plaintiff, it was held a verdict for the plaintiff was not supported by the evidence. *Broughton v. Smart*, 440.

**OF IMPOSING TERMS.**

4. When the circuit court offers a party a new trial on the terms that he pay the costs, and the offer is declined, and the motion is overruled and judgment rendered on the verdict, the party may still prosecute error, and urge the refusal to give proper, and the giving of improper instructions, as grounds of reversal. *Wiley v. Town of Brimfield*, 306.

**NOTICE.****NOTICE BY POSSESSION.**

1. *To subsequent purchasers.* Where a vendor of land continues to remain in possession of the premises, such possession will constitute constructive notice to a subsequent purchaser from his vendee, of the rights and equities of the first vendor in the land, and the second purchaser will hold subject to those rights and equities. *Illinois Central Railroad Co. v. McCullough*, 166.

**PUBLICATION OF NOTICE.**

2. *Proof as to what is a corporation newspaper.* Where a city charter required the common council to designate a newspaper in which notices and the proceedings of the corporation should be published, it appeared that such notices and proceedings were published in a particular paper, and it was recognized by the officials as the corporation newspaper,—a certificate of publication given by the publisher, was offered in evidence: *Held*, that such facts, as to the public, and third persons, were *prima facie* evidence that the paper had been designated as the corporation paper, and the appointment need not be proved by producing the record showing the appointment; that it is similar to proof that a person has acted as a public officer, which is *prima facie*, without producing his commission. *Rich et al. v. City of Chicago*, 226.

**TAXING ATTORNEY'S FEES AS COSTS.**

3. *Necessity of notice.* In a suit for an assignment of dower, and for partition, an order allowing a large sum as attorney's fees to be

**NOTICE. TAXING ATTORNEY'S FEES AS COSTS. *Continued.***

taxed as costs, the fees allowed by the court amounting to \$1200, without notice to the parties to be affected thereby, is void upon principles of natural justice, without reference to any other consideration. *Lilly et al. v. Shaw et al.* 72.

**REVOCATION OF LICENSE.**

4. *To pass over the land of another—whether notice required.* See LICENSE, 1.

**OATHS.**

**IN THE MATTER OF A SPECIAL ASSESSMENT.**

*Of the oath of the commissioners.* See SPECIAL ASSESSMENTS, 1.

**OFFICERS.**

**ORDER TO SUSPEND SALE UNDER EXECUTION.**

1. *Liability of the officer for disregarding instructions—and to whom.*

Where an officer, who has an execution in his hands, sells property contrary to the instructions of the plaintiff to suspend the sale, he thereby incurs a liability to the defendant in the execution, for the damage sustained by reason thereof. *Morgan et al. v. The People, use of Lewis*, 58.

2. So, it is no answer to the declaration, in an action of debt on a sheriff's bond, where the breach assigned is, that the officer sold property of the defendant in the execution, after being ordered by the plaintiff to suspend the sale, that the property was so sold by virtue of such execution, in the hands of the officer, against the goods and chattels of said defendant. *Ibid.* 58.

3. Nor is it a defense that the sale was so made by direction of the plaintiff's attorney, it not appearing but that the attorney may have violated the orders of the plaintiff. *Ibid.* 58.

4. *Giving such direction by telegraph.* See TELEGRAPHY, 1.

**TRESPASS BY AN OFFICER.**

5. *In the execution of process—of the rights of privies to the judgment.*

A person who was a silent partner of the plaintiff in an action of replevin, in respect to the goods involved in the suit, purchased his co-partner's interest therein pending the suit, and took the property into his own possession. The action of replevin was dismissed without a trial upon the merits, and a writ of *retorno habendo* awarded, which was placed in the hands of an officer, who went upon the premises of the party who had thus obtained the possession of the goods, and seized them under the writ: *Held*, the person from whom the goods were taken under the writ of *retorno habendo*, in either capacity—as a partner of the plaintiff in replevin, or as his vendee pending that

**OFFICERS. TRESPASS BY AN OFFICER. *Continued.***

suit—was a privy to the judgment awarding the writ of *retorno*, and was estopped from asserting his title as against the right of the officer to execute the writ. The officer was not a trespasser in making return of the property. *Merritt et al. v. Egan*, 212.

**OFFICIAL BONDS.****INCREASING LIABILITY OF SURETY.**

*After the execution of the bond.* See SURETY, 4, 5.

**OUTSTANDING TITLE.****TENANTS IN COMMON.**

*Whether one of them may buy in an outstanding title.* See JOINT RIGHTS AND INTERESTS.

**PARENT AND CHILD.****WHETHER FORMER LIABLE FOR THE TORTS OF THE LATTER.**

A father is not liable for the torts of his children, committed without his knowledge or consent, and not in the course of his employ. *Wilson v. Garrard*, 51.

**PARTIES.****IN CHANCERY.**

1. The bonds of a county, issued upon a subscription of the county to the stock of a railroad company, were placed by the county authorities in the hands of a custodian, to be delivered to the company on certain conditions. The company having incurred a debt on account of work done on the road, gave to their creditor an order on the custodian of the bonds for a sufficient amount of them to satisfy the claim, and that order was assigned to a third person. Another company succeeded to the rights and franchises of the original company: *Held*, in a suit by such holder of the order given for the bonds by the original railroad company, to compel the delivery of them by the custodian, such original company, having ceased to exist and all its rights and franchises vested in its successor, is not a necessary party to the bill. *Thomas v. County of Morgan et al.* 479.

**MAKING NEW PARTIES IN CHANCERY.**

2. *Necessity of amending bill.* A, being the equitable owner of the first of two promissory notes secured by a mortgage, filed a bill to procure a sale of the mortgaged premises, making B a defendant, and alleging that the second note had been assigned to him; that he had obtained judgment on it, and sold and bid in the mortgaged premises under his judgment. B answered, setting up that in doing this he

**PARTIES. MAKING NEW PARTIES IN CHANCERY. *Continued.***

was acting merely as agent for C, to whom the note, judgment and certificate of purchase belonged and had been assigned: *Held*, the interest of C in the subject matter of the litigation being thus disclosed, the complainant should have amended his bill and made him a party; and to proceed to final decree without giving him an opportunity to protect his interests, was error, for which the decree should be reversed. *Lietse v. Olabaugh et al.* 186.

8. *On motion.* In a suit in chancery for the assignment of dower, and for partition, the court made an allowance for attorney's fees—the allowance not being made as costs taxed in the cause, as contemplated by the statute, but the solicitors, in whose favor it was made, being introduced as new parties into the record, upon mere motion, and the sum allowed to them by name, the order, if allowed to stand, would entitle them to execution in their favor, and was, in that respect, irregular. *Lilly et al. v. Shaw et al.* 72.

**COVENANT AGAINST INCUMBRANCES.**

4. *May be sued upon by a remote grantee.* See COVENANTS FOR TITLE, 1.

**PARTITION.****OF THE LANDS OF INFANTS.**

1. *A court of chancery the guardian of infants.* The right of partition of lands among several owners, and the consequent sale, if not susceptible of division, is not absolute in all cases. *Hartmann et al. v. Hartmann*, 108.

2. So, upon bill filed for partition by a guardian, in the names of his wards, who were the owners of the fee, their father, who was made defendant, being tenant by the curtesy and consenting to the relief sought, it appeared the land was worth \$80 per acre, was underlaid with coal, and, from its favorable location, likely to increase in value, and worth \$8 per acre rent. The land not being susceptible of division, would have to be sold, and no reason was shown why a partition should be had: *Held*, though the land was then less productive than the proceeds of a sale in money, yet it was a safer investment for the infant owners than money loaned, and, under the circumstances, their interests would be best subserved by refusing to permit a sale, which a court of chancery, in the exercise of its general supervision over the rights and interests of infants, ought to do. *Ibid.* 108.

3. *In view of the rule of distribution, under the life tables.* Another objection to the relief sought in this case, was, that in distributing the proceeds of a sale according to the tables of mortality, which would afford the rule of distribution, the tenant by the curtesy, who was

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# **PARTITION. OF THE LANDS OF INFANTS. *Continued.***

forty-one years of age, would take 67 52-100 per cent of the proceeds, and the children 32 48-100 per cent. This would give the father too much as against the children. *Hartmann et al. v. Hartmann*, 103.

## **OF A PAROL PARTITION.**

4. *A parol partition* of land among several tenants in common, to be valid, must be followed up by a several possession. *Vasey v. Board of Trustees, etc.* 188.

5. *Presumption.* Exclusive possession by one, of a particular part of the estate, accompanied by a denial of the co-tenant's right to such part, may create a legal presumption of partition. *Ibid.* 188.

## **INTERESTS OF PARTIES MUST BE DECLARED.**

6. *Before order of sale.* In a suit for partition it is an essential requirement of the statute, that, preceding the order of sale, the court shall declare the interests of the parties, order a partition of the premises, and appoint commissioners to make the division. *Denning et al. v. Clark*, 218.

7. Such preliminary orders, to the order of sale, can not be made after the sale has taken place, so as to support it. *Ibid.* 218.

# **PASSENGERS.**

CARRYING PASSENGERS BEYOND THEIR STATION. See RAILROADS, 1.

PASSENGER LEAVING A TRAIN WHILE IN MOTION. Same title, 2, 3.

ON RAILROAD FREIGHT TRAINS. Same title, 4, 5, 6.

# **PAYMENT.**

## **WHAT CONSTITUTES A PAYMENT.**

1. *In case of an offer to sell land, with an option on the part of the buyer.* See CONTRACTS, 1.

## **CHECK NOT DRAWN AGAINST FUNDS.**

2. A check not drawn against funds, is not payment; it is received but as a means of payment. *Mathews et al. v. Cowan et al.* 841.

## **OF FINES, FORFEITURES AND PENALTIES.**

3. *Right of State's attorney to control their collection, under act of 1865.* See STATE'S ATTORNEYS, 1, 2.

## **PAYMENT TO A THIRD PERSON.**

4. *Evidence in respect thereto—burden of proof.* See EVIDENCE, 16.

# **PENALTY.**

## **PROCEEDING TO COLLECT.**

*Whether civil or criminal.* See ACTIONS, 2, 3.

# **PLACITA. See CONVENING ORDER, 1.**



## PLEADING.

## OF THE DECLARATION.

1. *On a penal bond.* In actions brought on penal bonds, conditioned for the performance of covenants, the statute requires the obligee to assign breaches; and though the action be debt, yet, in respect to the assignment of breaches, it is assimilated to the action of covenant, and governed by the same rules. Each assignment of breaches is regarded as a declaration, and to be pleaded to as such. *Safford v. Miller et al.* 205.

2. *In an action upon a covenant to two, jointly—of an assignment of a breach for damages to one.* In an action by two obligees, upon a bond for the performance of covenants wherein the legal interest of the obligees is joint, a count, or assignment of breaches, for particular damages resulting to one of the plaintiffs individually, is bad in substance. *Ibid.* 205.

3. So, where an injunction bond recited that the principal obligor had obtained an injunction restraining A and B from the further prosecution of certain suits at law, commenced respectively by the said A and B, and conditioned "that if the obligor shall pay, or cause to be paid, to the said A and B all such damages as they may sustain by reason of the issuing of said injunction, and also such costs and damages as may be awarded against the said obligor by the court in case the said injunction herein shall be dissolved, then," etc., it was *held*, in an action on the bond by A and B, the bill having been dismissed, that a breach in the declaration, claiming damages resulting to one of the plaintiffs alone, by reason of being deprived, by means of the injunction, of the possession and the enjoyment of the rents and profits of certain premises owned by him, was bad on demurrer, because it sought to recover for a separate injury to one, upon a covenant to him and another jointly. *Ibid.* 205.

## MISJOINDER OF COUNTS.

4. In an action upon a covenant to two jointly, where some of the assignments of breaches are for damages resulting to both plaintiffs,—one for damages sustained by one plaintiff, and another for damages sustained by the other, as to which his co-plaintiff has no interest, there is a misjoinder of counts. *Ibid.* 205.

## DESCRIPTION OF MAKERS OF NOTE.

5. *Whether as partners.* In an action on a promissory note, the plaintiff, in the commencement of his declaration, complained of A B and C D, partners, etc., defendants, in a plea, etc., and then alleged that the defendants made their certain promissory note in writing, by which said note said defendants, by the name, style and description of A B, promised to pay, etc.: *Held*, the word "partners" in the commencement of the count was merely descriptive of the persons, and

**PLEADING. DESCRIPTION OF MAKERS OF NOTE. Continued.**

had nothing to do with the character in which the defendants executed the note, and hence, to such a count, a plea denying the partnership would present an immaterial issue, and a plea denying the execution of the note, verified, was a complete answer to the declaration. *Karch v. Emerick*, 184.

**OF DECLARING SPECIALLY.**

6. *Or whether the plaintiff may recover under the common counts.* See PLEADING AND EVIDENCE, 10 to 18.

**PLEAS.**

7. *Special plea amounting to general issue.* To a declaration in an action on a promissory note against two defendants, alleging that the defendants executed and delivered the note to the plaintiff, a plea of one of the defendants, in form special, averring that the consideration for the note was received by his co-defendant, and was the individual debt of such co-defendant, and denying his joint liability, is bad on a special demurrer, that it amounts only to the general issue. *Karch v. Emerick*, 184.

8. *Of a plea purporting to answer the whole declaration, but does not.* In an action of replevin, in which the declaration contained a count for the taking, and also one for detaining, the property, a special plea purported to answer the entire cause of action,—it avowed the taking of the property under an execution, and averred that it was the property of the execution debtor, and not of the plaintiff. This was regarded as presenting a complete bar to the cause of action, and the plea was not obnoxious to the objection that it professed in the commencement to answer the whole declaration, and only answered the first count, for the taking. *Lammers v. Meyer*, 214.

9. *Traversing conclusion of law.* A plea is bad which is a traverse of a mere conclusion of law. *Safford v. Miller et al.* 205.

10. *Of a plea of justification in replevin.* In an action of replevin, a plea of justification, that the defendant took the property by virtue of an execution directed to him as sheriff, averred "that at the time when, etc., to wit, on the 22d day of August, 1870, he was sheriff," etc., "and on the 24th of May, 1870, at said county, an execution came into his hands, as such sheriff, issued by the clerk," etc., "dated the 24th day of May, 1870, on a judgment in said court, rendered on the 14th day of April, 1870," "which said judgment was then and there in full force and effect," "directed to this defendant, as such sheriff, to execute, and that by virtue of said execution this defendant, as such sheriff, did, on the 22d day of August, 1870, and in the lifetime of said execution, take said goods," etc. On objection that the plea did not show the execution was in full force at the time of the levy, it was

**PLEADING. PLEAS. Continued.**

*held*, according to a reasonable construction the plea showed that the judgment, and of course the execution issued thereon, were in full force and unsatisfied on the 24th day of May, 1870, and that the levy was in the lifetime of the execution. This was equivalent to an averment that the execution was in full force at the time of the levy. *Lammers v. Meyer*, 214.

11. In such a plea, no allegation was necessary as to the date of the judgment, and it might be rejected as surplusage, and need not be proved. Its rejection would not alter the general sense or effect of the plea. *Ibid.* 214.

**PLEA UNANSWERED.**

12. *Trial without an issue.* Where a case stands merely upon a plea of confession and avoidance, which constitutes a good bar to the action, a verdict and judgment in favor of the plaintiff, resulting from a trial while such plea remains unanswered, will be erroneous, there being no issue to be tried. *Lindsay v. Stout*, 491.

**DEMURRER.**

13. *Carried back to former pleading.* It is a general rule that, upon demurrer, the court should, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance. *Safford v. Miller et al.* 205.

**CERTAINTY IN PLEADING.**

14. A plea is not objectionable on account of obscurity or ambiguity, if it be certain to a *common intent*. It need only be clear enough according to reasonable intendment and construction. The rule is, that the natural sense must prevail. *Lammers v. Meyer*, 214.

**OF THE WORDS "THERE" AND "SAID."**

15. *Words of reference*, as "there" and "said," even in an indictment, will not be referred to the last antecedent, if the sense requires that they should be referred to some prior antecedent. *Ibid.* 214.

**WAIVER OF PLEA IN ABATEMENT.**

16. *By pleading in bar.* See ABATEMENT, 1.

**PLEADING AND EVIDENCE.****ALLEGATIONS AND PROOFS.**

1. *Of the theory upon which a bill is framed.* Every fact essential to the plaintiff's title to maintain a bill and obtain the relief sought, must be stated in the bill, otherwise the defect will be fatal; for no facts are properly in issue unless charged in the bill, and of course no proof can be generally offered of facts not in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court pronounces its decree *secundum allegata et probata*. *Helm v. Cantrell et al.* 524.

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. *Continued.*

2. So, where one of two partners executed a promissory note in the name of the firm, after the partnership was dissolved, for a pre-existing debt of the firm, but which had become barred by limitation, the other partner having no knowledge of the giving of the note at the time, upon bill filed by a subsequent holder, against the widow and heirs of the partner who did not participate in the making of the note, to subject real estate held by them to its payment, it was alleged that the note was made by the two members of the firm as partners, under the name and style of their firm. It was *held*, that under such an allegation it was not competent to prove that, although the deceased partner was not a partner at the time the note was given, yet he had subsequently ratified the act as shown by his admissions. To have rendered such admissions competent evidence, the bill should have disclosed the fact that they would be relied upon. *Helm v. Cantrell et al.* 524.

3. *As to the binding effect of a judgment.* And where the note in such case had been allowed by the county court, in a proceeding to which the administrator of the deceased partner was alone a party defendant, and the judgment thus obtained was treated in the bill as only *prima facie* evidence, it was held the complainant could not, upon the hearing, insist that it was conclusive upon the widow because she derived title to the land in controversy from the intestate, but must abide by the case made in his bill. *Ibid.* 524.

4. *As to the purpose for which a mortgage was given.* The allegation in a bill to foreclose a mortgage, that the mortgage was given to secure a certain note which appeared to be signed by several makers, was held to be substantially true, although the note was signed by one of the makers after the mortgage was given. It was the same note, except there was an additional security. *Vasey v. Board of Trustees, et al.* 188.

5. *Description of note sued on.* In an action on a promissory note which recited that it was "given for a right to clarify cider, ale, etc.," but the pleader, in declaring on the note according to its legal effect, omitted any such description, but otherwise described it correctly, it was *held*, there was no variance between the note and the declaration. It was not necessary that the declaration should set forth the particular consideration for which the note was given, although mentioned in the note. *Gaddy v. McCleave*, 182.

6. *As to the time a note becomes due.* In an action on a promissory note, the declaration described the note as payable "in twelve months after date," while the one offered in evidence was payable "twelve months after date." *Held*, there was no variance—the legal effect being the same, as neither would become due until the expiration of twelve months. *Tipton et al. v. Utley*, 25.

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. *Continued.*

7. It has been held that, where a note was declared on as payable "on or before" a certain day, and the one offered in evidence was payable "on" that date, there was no variance. *Tipton et al. v. Utley*, 25.

8. *Quære*—whether a note payable in twelve months after date could be legally discharged by the maker before the expiration of the time the note has to run. *Ibid.* 25.

9. *In an action upon a policy of life insurance*, the introduction of the policy, and receipts for the annual premiums required by its terms to be paid, and proof of the death of the party whose life is insured, will make a *prima facie* case in favor of the plaintiff. He is not bound to set out the application and prove its truth. *Mutual Benefit Life Ins. Co. v. Robertson*, 123.

## RECOVERY ON THE COMMON COUNTS.

10. *Or on special count.* In an action under the common counts to recover for work done by the plaintiff for the defendant, it appeared there was a special contract in writing for the performance of the work, and the work had been only partially completed. There was no abandonment of the contract by mutual consent, and no rescission thereof by any act of the defendant: *Held*, the rights of the plaintiff should be determined by the contract alone,—he could not recover, under the common counts, the price of the work already performed. *Phelps v. Hubbard*, 79.

11. Nor did the mere fact, that the parties had had an accounting, showing the amount due the plaintiff, and the expression of an intention on the part of the defendant to send him some money, have the effect to authorize a recovery of that amount in such an action. *Ibid.* 79.

12. A, being indebted to B, executed to him a promissory note for a sum larger than the indebtedness, and secured the same by a chattel mortgage on property fully worth the amount of the note. For the excess of the sum secured by the mortgage over the actual indebtedness A was to receive from B certain lumber, but which he never received. A afterwards became indebted to C, but being in embarrassed circumstances could not pay him, all his property being covered by the mortgage, which B had proceeded, or was about to proceed to foreclose. The three parties met together, and to satisfy the claim of C, an arrangement was made by which the demand A had on B for the difference between his actual indebtedness and that expressed in the mortgage, was compromised at the sum A owed C, B agreeing to pay the same to C: *Held*, B's promise in that regard was not within the statute of frauds, and C was entitled to recover on the same, under the common counts in assumpsit. The promise of B being regarded as an original undertaking to pay his own debt, to C, it was unnecessary to declare specially. *Runde v. Runde*, 98.

## PLEADING AND EVIDENCE.

RECOVERY ON THE COMMON COUNTS. *Continued.*

13. *Where the terms of a letter of credit are exceeded.* A bank gave a letter of credit to a person, guaranteeing the payment of drafts which might be drawn by the latter on a firm named in the letter, to the amount of \$14,000, the letter providing that indorsements might be made thereon. The person to whom the letter was given, made a draft for \$6000, which was endorsed on the letter. He then drew for \$2000, which was also endorsed on the letter. This draft was forwarded for collection to the bank giving the guaranty, which was advised by letter that it was drawn under the letter of guaranty. The holder of the letter then made a draft for \$4000, which was not endorsed on the letter, nor, in sending the bill for collection to the same party as before, was any reference made to the letter of guaranty; but the draft was paid by the drawees. He then drew for \$6000, the draft purporting on its face to be drawn against the letter of credit, which was returned to the bank which gave it, with this draft, for collection. This last draft was protested. All the drafts except the first were drawn in favor of the same party. In a suit by the latter upon the guaranty, to recover the amount of the draft for \$6000, which was protested, it was *held*, the defendant was not liable, because, on the payment of the previous drafts, amounting to \$12,000, it was exonerated from liability on its guaranty, except to the extent of \$2000, the residue of the amount guaranteed. Nor, in such case, could the plaintiff recover, on the common counts, even to the extent of \$2000, the residue of the amount named in the letter of credit. The defendant's liability arose only from the guaranty, and that should have been declared upon specially. *Omaha National Bank v. First National Bank of St. Paul*, 428.

## COUNT ON AN ACCOUNT STATED.

14. *What will support it—waiver of laches of holder of bill of exchange.* After a bill of exchange had been refused payment by the drawee, in an interview between the holder and the drawer, the latter admitted the claim to be just, and the amount due on the bill was computed and agreed to by the drawer, and he promised to pay it by a day named, or send the holder a note for it. It was held that evidence of these facts would justify a recovery under a count on an account stated, and that it amounted to a waiver of any laches with regard to the bill, had there been any. *Smith & McCord v. Curlee*, 221.

## PLEA DENYING EXECUTION OF INSTRUMENT.

15. *Admissibility of evidence under, when not verified by affidavit.* Under a plea denying the execution of the note sued on, but not verified by affidavit, the defendant will not be permitted, on the trial, to deny his execution of the note. *Gaddy v. McCleave*, 182.

PLEADING AND EVIDENCE. *Continued.*

ASSIGNMENT OF PROMISSORY NOTE.

16. *Under what state of pleading proof of the assignment is necessary.*  
See ASSIGNMENT, 1, 2, 3.

POSSESSION.

NOTICE BY POSSESSION.

*To subsequent purchasers.* See NOTICE, 1.

PRACTICE.

WHEN THE SPECIFIC OBJECTION SHOULD BE MADE.

1. *In regard to the acknowledgment of a sheriff's deed.* Where a sheriff's deed was read in evidence, and only a general objection was interposed at the time, the objection can not be urged for the first time on error that the deed was not acknowledged before a proper officer. Had that objection been made on the trial, it could have been obviated by proving the signature of the sheriff. *Osgood v. Blackmore*, 261.

TIME OF TAKING CERTAIN OBJECTIONS.

2. In a bill to foreclose a mortgage, it was alleged the mortgage was given to secure a certain promissory note which appeared to be signed by four persons, when, in fact, one of the makers signed the note after the mortgage was given: *Held*, even if there was no allegation to meet the changed character of the note, the objection came too late when made for the first time in the appellate court; it should have been made in the court below, so that, if necessary, the bill could have been amended. *Vasey v. Board of Trustees*, etc. 188.
3. *In regard to the action of a master in chancery on a reference in a matter of accounting, when the objection should be made.* See CHANCERY, 18, 14, 15.

PLEA UNANSWERED.

4. *Trial without an issue.* See PLEADING, 12.

ADMISSION OF EVIDENCE WITHOUT OBJECTION.

5. *Whether conclusive as to its legal effect.* See EVIDENCE, 14.

PRACTICE IN THE SUPREME COURT.

DECORUM IN ARGUMENT.

1. *Indecorous language towards the Judge below.* Where counsel employ, in their printed arguments in this court, improper and indecorous language respecting the judge below, such arguments will be stricken from the files, and such other action taken as will protect the circuit judges from like aspersions. *Mutual Benefit Life Ins. Co. v. Robertson*, 128.

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**PRESUMPTIONS.****CONFESSION OF JUDGMENT.**

1. *As to sufficient proof on confession of judgment under warrant of attorney.* See JUDGMENTS, 1.

**JURISDICTION.**

2. *As to jurisdiction of superior and inferior courts.* See JURISDICTION, 1.

**PARTITION.**

3. *Presumption of a partition, as between tenants in common.* See PARTITION, 5.

**FILLING BLANKS IN AN INSTRUMENT.**

4. *Presumption as to authority so to do.* See CONTRACTS, 8.

**PRINCIPAL AND AGENT.** See AGENCY.**PROCESS.****MARRIED WOMEN.**

1. *Whether service upon the husband sufficient.* The common law rule, that service of summons, against husband and wife, on the husband alone, is good against both, is so far changed by the legislation in this State in respect to the right of property of married women, that whenever it is sought by a judicial proceeding to affect the rights of property of a married woman, she must be served with process. *Piggot et ux. v. Snell*, 106.

2. And even at common law, it has been held necessary, where the plaintiff is seeking relief out of the separate estate of the wife, that the wife should be served. *Ibid.* 106.

3. So, in a suit in chancery against husband and wife, to foreclose a mortgage executed by both, and there was service upon the husband alone, it was held to be erroneous to decree a foreclosure against both the defendants, although it did not appear what was the nature of the wife's interest in the mortgaged premises. *Ibid.* 106.

**SENDING PROCESS TO FOREIGN COUNTY.**

4. *Against a sole defendant.* The language of the act of 1861, authorizing process to be sent against a sole defendant into a county other than that in which the suit is brought, when the action is upon a contract that has been made in the county in which the action is brought, and the plaintiff is a resident of such county, precludes, by necessary implication, the sending of process to a foreign county against a sole defendant in any action not brought upon a contract. *Wirtz v. Henry et al.* 109.

5. So, to an action on the case brought to recover damages for alleged fraud and deceit practiced by the defendant in making a contract, and not for a violation of any of its terms, or to assert a right based upon the contract, it was held, the act did not apply. *Ibid.* 109.



PROCESS. *Continued.*

## SERVICE AFTER RETURN DAY.

6. *Effect thereof.* Service of a summons after the return day thereof, is insufficient to give the court jurisdiction of the person of the defendant—is a nullity. *Draper v. Draper*, 119.

## RETURN OF SERVICE, IN CHANCERY.

7. *Its requisites.* The return of service upon a chancery summons was as follows: "I have served the within writ upon the within named Susan J. Piggott, by leaving a true copy of the same with James A. Piggott, a white person of the family, above the age of ten years, and informing the said James A. Piggott of the contents thereof, this 17th day of February, A. D. 1869:" *Held*, the return was defective in not stating that the copy was left at the usual place of abode of the defendant, and for that reason was insufficient to confer jurisdiction of her person. Where the service is by copy, the return must show a strict compliance with the statute. *Piggott et ux. v. Snell*, 106.

## OFFICER'S RETURN.

8. *Its effect.* The return of a sheriff on an execution under which he had made a sale of property, even if it showed a defective notice of the sale, could not affect the rights of the purchaser. The statute has not made such return evidence of any fact, nor is it a link in the chain of title, and neither immediate nor remote purchasers can be affected by it. *Osgood v. Blackmore*, 261.

## CONTRADICTING RETURN OF OFFICER.

9. *When allowable.* See DEFAULT, 2.

## EXECUTION.

10. *Who may control the action of an officer under an execution.* See EXECUTION, 1.

## COURT OF COMMON PLEAS OF SPARTA.

11. *To whom process issued therefrom should be directed, and of the venue of a writ.* See SPARTA, COURT OF COMMON PLEAS OF.

## PROMISSORY NOTE.

## OF THE TIME OF ITS MATURITY.

*Construction of a note in that regard.* See PLEADING AND EVIDENCE, 6, 7, 8.

## PROTEST.

## AS TO INLAND BILLS OF EXCHANGE.

*Protest not necessary.* *Smith & McCord v. Curles*, 221.

## PUBLICATION OF NOTICE. See NOTICE, 2.

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**PURCHASERS.****PURCHASER PENDENTE LITE.**

1. Will hold in subservience to the rights of the parties as finally determined in the pending litigation. *Alwood v. Mansfield et al.* 496.

**SUBSEQUENT PURCHASER UNDER A DECREE.**

2. *Of his rights as against a prior unrecorded deed from the parties to the decree.* A decree in chancery authorized the sale and conveyance of "all the interest" of the parties in the suit, in and to certain land therein described, and the land was sold under that decree. The bill alleged that the parties, complainant and defendant, were the owners of the land, and that it had never been disposed of or conveyed by them. The decree found that allegation to be true. In fact, however, the parties had previously conveyed the land by deed, but which was not recorded at the time of the sale under the decree. It was *held*, in view of the allegations in the bill in respect to the title, the finding of the court thereon and the absence of the prior deed from the record, the words "all the interest," found in the decree and in the deed made under it, should not be construed as a limitation of the estate conveyed, so as to give any effect to the prior unrecorded deed as against the purchaser under the decree. *Hurpham et al. v. Little*, 509.

3. Such a conveyance as that made under the decree is unlike a deed of release and quit claim, by which the grantor only undertakes to convey the interest he has, but it passes the entire title, without regard to a prior unrecorded deed from the same parties. *Ibid.* 509.

**SALE OF MUNICIPAL BONDS.**

4. *To whom allowable.* The sale of its bonds by a municipal corporation to the members of its council, is void, irrespective of the principles of equity as applied to persons acting in a fiduciary capacity, and independent of the fact that it was a part of a scheme to pervert the property of the corporation from its legitimate municipal purposes to private ends. Such a sale is void, on the ground that no man can contract with himself. If a board of trustees were to convey the corporate property to themselves, the sale would be void, without reference to its fairness or its benefit to the corporation. So, if such a sale is made to one of their members, he being one of the parties contracting with himself. *Sherlock et al. v. Village of Winnetka et al.* 389.

5. Nor does it change the transaction, where a portion of the trustees were also trustees of an academy, and to whom the sale was made, and where the sale was for the purposes of fraudulently perverting the corporate property of the municipality to the purposes of mere private enterprise. *Ibid.* 389.

6. The bonds issued by the corporation to its own members being void in their hands, they could not be enforced for either principal or

**PURCHASERS. SALE OF MUNICIPAL BONDS. *Continued.***

interest, and nothing could be due thereon in their hands; and it follows that the levy of a tax for their payment would be illegal, unjust and oppressive to the tax payers. *Sherlock et al. v. Village of Winnetka et al.* 389.

**PURCHASERS AT JUDICIAL SALES.**

7. *How far affected by defective notice or other irregularities attending a sale.* See SALES, 2, 3, 4.

**SUBSEQUENT PURCHASER FROM ADMINISTRATOR OF MORTGAGOR.**

8. *Of his relation to the mortgaged premises, and the mortgages.* See MORTGAGES, 3, 4.

**SALE ON EXECUTION AGAINST HEIRS OF MORTGAGOR.**

9. *Rights of purchaser in respect to the mortgage.* Same title, 5.

**OF A LICENSE TO USE THE WALL OF A BUILDING.**

10. *Rights in respect thereto of the grantees of the respective parties.* See LICENSE, 2, 3, 4, 5.

**QUO WARRANTO.****OF THE INFORMATION.**

An information in the nature of a *quo warranto* must run "in the name and by the authority of the People of the State of Illinois," as required by the constitution, and the omission of these words may be taken advantage of in arrest or on error. *Hay et al. v. The People.* 94.

**RAILROADS.****CARRYING PASSENGERS BEYOND THEIR STATION.**

1. If a railway passenger, holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination. *Illinois Central Railroad Co. v. Able*, 181.

**PASSENGER LEAVING A TRAIN WHILE IN MOTION.**

2. But if such passenger voluntarily leaps from the train when in rapid motion, or leaves it under circumstances which would necessarily or probably render such an act perilous, and receives bodily injury, he could not recover damages for the injury, because it would be the result of his own want of ordinary care. *Ibid.* 181.

## RAILROADS.

PASSENGER LEAVING A TRAIN WHILE IN MOTION. *Continued.*

3. Though in case the passenger is not allowed a reasonable opportunity to alight, there being a slight stoppage of the train, but he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and nevertheless bodily injury follows, in such case the passenger would be entitled to recover damages for the injury,—the passenger having the right to construe the momentary halt of the train at the station as an invitation to alight, and in his attempt to make use of such opportunity when not attended with apparent danger, being chargeable with no appreciable negligence, in comparison with the flagrant breach of duty on the part of the company in neglecting to afford a reasonable opportunity to leave the train in safety. *Illinois Central Railroad Co. v. Able*, 131.

## PASSENGERS ON FREIGHT TRAINS.

4. It is not an unreasonable rule for a railroad company to require that parties desiring to ride on freight trains shall procure tickets sold expressly for such trains. *Illinois Central Railroad Co. v. Nelson*, 110.

5. A railroad company, when carrying passengers on a freight train, are not required to draw the train up to the passenger platform to enable persons using that means of conveyance to pass to and from the cars, unless it has been the custom of the company so to do. If such was the usage, then they would be required to conform to it in all cases; otherwise, they have the right to receive passengers on their freight trains and discharge them at the usual place adopted for that mode of travel. *Ibid.* 110.

6. Where a person took passage on a freight train, without first procuring the kind of ticket required by the rules of the company to entitle him to ride on that character of train, it was *held*, the conductor had the right to require him to leave it at the usual place of getting on and off such trains, at a station. *Ibid.* 110.

CONDEMNATION OF RIGHT OF WAY. See RIGHT OF WAY.

NEGLIGENCE IN RAILROADS. See NEGLIGENCE.

## RATIFICATION.

## BY SURETIES.

*As to filling blanks in a bond after the same was signed.* See SURETIES, 8, 9, 10.

BY PRINCIPAL, OF ACTS OF AGENT. See AGENCY, 5.

## IRREGULARITIES IN SALE ON EXECUTION.

*Of the ratification thereof.* See SALES, 5, 6

**RECORD.****MINUTES OF A JUDGE.**

*Constitute no part of the record.* See **CRIMINAL LAW**, 2.

**REDEMPTION.****BILL TO REDEEM.**

*Where a judgment debtor has been induced to let the statutory period for redemption expire.* See **CHANCERY**, 8.

**REMEDIES.****WHERE ONE PURCHASES LAND AND ANOTHER TAKES THE TITLE.**

1. *Remedy of the real owner.* See **ASSUMPSIT**, 1.

**OF CONTRACTS AGAINST PUBLIC POLICY.**

2. *Whether equity will interpose as between the parties.* See **CHANCERY**, 5, 6, 7.

**REMEDY OF AN EQUITABLE ASSIGNEE.**

3. *In the matter of the holder of an order from a railroad company for municipal bonds issued on subscription to the stock of the company.* See **SUBSCRIPTION**, 4.

**OF A FUND UNDER THE CONTROL OF A COURT OF CHANCERY.**

4. *Remedy of a party claiming the same, who is not a party to the suit.* See **CHANCERY**, 13.

**REMEDIES AGAINST MARRIED WOMEN.**

5. *Upon contracts in respect to their separate property—whether at law or in equity.* See **MARRIED WOMEN**, 1 to 4.

**TO RECOVER A PENALTY.**

6. *For violation of a town ordinance.* See **ACTIONS**, 2, 3.

**FENCE POSTS APPROPRIATED BY A THIRD PERSON.**

7. *Remedy in trover.* See **TROVER**, 1.

**TO PREVENT A WRONGFUL ACT.**

8. *As, a breach of the peace or an ordinary trespass.* See **INJUNCTIONS**, 1, 2, 3.

**TO RECOVER FIXTURES.**

9. *Which are in the possession of another, same title,* 2.

**WHERE VENDEE OF CHATTELS REFUSES TO PAY.**

10. *Remedy of the vendor.* See **TROVER**, 2.

**REMITTITUR.****WHEN AND HOW TO BE MADE.**

1. A *remittitur* written in a bill of exceptions after the term at which the judgment was rendered, and in vacation, will not operate to cure an error in the judgment in respect to the matter attempted to be remitted. The remission, to have that effect, should be made during the term of the court, and while the judgment is under its control. *Russell v. Hubbard et al.* 335.

**REMOTE AND PROXIMATE CAUSE.** See **NEGLIGENCE**, 7 to 11.

**REPLEVIN.****WHETHER THE ACTION WILL LIE.**

*To recover fixtures.* See **INJUNCTIONS**, 2.

**OF PLEAS IN THE ACTION.** See **PLEADING**, 10, 11.

**OF THE JUDGMENT.** See **JUDGMENTS**, 4.

**RESCISSION OF CONTRACTS.**

**IN CHANCERY.** See **VENDOR AND PURCHASER**, 8; **CHANCERY**, 7, 8, 9.

**BY THE PARTIES.** See **CONTRACTS**, 18, 19.

**RETURN OF PROCESS.** See **PROCESS**, 7, 8.

**RETURN OF SALE ON EXECUTION.**

**NOT NECESSARY.** See **SALES**, 7.

**REVERSIONARY INTEREST.****ACTION FOR INJURY THERETO.**

1. Where a landlord has leased a house, and a mill was erected so near thereto as to deposit dust, smut, etc., on the house, a recovery for the damage occasioned thereby to the reversion may be had by the landlord; but if it is not permanent and injurious to the reversion, the landlord can not recover. *Cooper v. Randall et al.* 817.

**RIGHT OF WAY.****FOR A RAILROAD.**

1. *Condemnation under act of 1852—of the question of compensation and benefits.* Where individual property is condemned for the use of a railroad, under the act of 1852, the land taken must be paid for, under all circumstances, without regard to the benefits accruing to the owner by reason of the construction and operation of the road. *Wilson v. The Rockford, Rock Island & St. Louis Railroad Co.* 278.

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RIGHT OF WAY. FOR A RAILROAD. *Continued.*

2. The measure of compensation in such case, and as guaranteed by that clause of the constitution of the State, which declares that "no man's property shall be taken or applied to public use without just compensation being made to him," is the market value of the land taken. *Wilson v. The Rockford, Rock Island & St. Louis Railroad Co.* 273.

3. But, as against the damages to portions of such owner's property not taken, resulting from the construction and operation of the road, may be set off the benefits accruing to him thereby. *Ibid.* 273.

4. Where the right of way run through a man's farm so as to sever a strip of about two acres from the body of the farm, thus rendering it useless to him for farming purposes, it was *held*, that while compensation could not be demanded for such strip, it not being taken by the road, yet it would form an element in estimating the damages the owner would sustain, if any, by the construction and operation of the road—such strip or its value, the great inconvenience to which the owner is put, and the danger to which he, his family and stock are exposed, in passing from one part of the farm to the other, being regarded as proper elements to be considered by the jury in assessing the damages, against which should be set off the facilities afforded by the road, and a convenient depot for getting the products of the farm to market, as also the actual increase in the market value of the farm, occasioned by the road. *Ibid.* 273.

5. *Assessment of damages—what are proper subjects therefor.* All injuries which are appreciable, and which result to the owner of land from the construction of a railroad over the same, are legitimate subjects in the estimation of damages, in a proceeding for condemning the right of way. *St. Louis, Vandalia & Terre Haute Railroad Co. v. Mollet*, 285.

6. If fruit trees, which are upon the land taken, were not included in the damages for the land itself, they may properly be the subject of a separate assessment. The mode of assessment is immaterial, so that the damages are assessed fairly and truly. *Ibid.* 285.

7. So, where ditching the adjacent land becomes necessary by reason of embankments thrown up for the road, the expense thereof is a proper element to be considered in assessing the damages. *Ibid.* 285.

8. But cattle guards are not proper subjects for such an assessment, because they could enter into the estimate only on the hypothesis that the proprietor of the land may construct them, which he would have no right to do, except by permission of the company. *Ibid.* 285.

RIGHT OF WAY. *Continued.*

## FORM OF THE JUDGMENT.

*In such proceeding.* See JUDGMENTS, 5.

RIGHT OF WAY OVER THE LAND OF ANOTHER. See EASEMENT, 1.

## SALES.

## JUDICIAL SALES.

1. *Sale of land en masse, under execution.* When the sheriff sells lands *en masse*, which could have been divided without injury to the parties, it is an irregularity that would enable the defendant to avoid the sale, on motion or otherwise, before the time for redemption expires, but it does not render the sale void. *Osgood v. Blackmore*, 261.

2. *Defective notice of sheriff's sale.* Where a sheriff sells lands under execution on a defective or insufficient notice, the sale is not void, or even voidable, unless the purchaser has notice of the irregularity. And *bona fide* subsequent purchasers, without notice, can not be affected by such non-compliance with the statute. *Ibid.* 261.

3. *Postponement of sale.* Where the sheriff published the notice of the sale, as required by the statute, and subsequently inserts under it: "The above sale is postponed until the 30th day of November, 1861," which was not signed by the sheriff, but was, with the notice, published in three weekly issues of the newspaper: *Held*, that the notice of postponement of the sale thus made was sufficient, and the fact that it was only thus published sixteen days, did not render the sale void, but voidable, by the defendant, if urged in apt time. *Ibid.* 261.

4. A sheriff, after giving the requisite notice of time and place of the sale of land, under an execution, and on the day named in the notice, at the request of plaintiff's attorney, adjourned the sale for one day, when the property was offered and bid in by the plaintiff in execution, and after receiving a deed, the land was sold to third persons, and by *meane* conveyances came to defendant: *Held*, that such an adjournment did not render the sale void, but voidable by appropriate proceedings commenced in apt time. *Jackson et al. v. Spink*, 404.

5. *Ratification—waiver of irregularities.* The acquiescence in such a sale, by the defendant in execution, for about seven years, must be regarded as a ratification of the irregularity in the sale, and the heirs of the defendant in execution can not take advantage of the non-compliance with the statute in making the sale. Nor can such an irregularity be urged in a collateral proceeding. *Ibid.* 404.

6. This irregularity, like the failure to sell in smaller tracts when land is susceptible of division, or selling the land on which the debtor resides, before his other lands have been sold, may be waived by the execution debtor. *Ibid.* 404.



SALES. JUDICIAL SALES. *Continued.*

7. *Return of sale not essential.* It is not necessary to the validity of the sale of real estate that the officer should make a return of the sale on the execution. The law does not require it. The purchaser may rely upon the judgment, the execution and the sheriff's deed. His title will not be affected by an imperfect return, or the want of a return. The deed is evidence that the law has been complied with, until the contrary is shown. The cases of *Thornton v. Boyden*, 31 Ill. 200, and *Botsford v. O'Conner*, 57 Ill. 72, considered and limited. *Jackson et al. v. Spink*, 404.

8. *What is subject to levy and sale—title under certificate of register of land office.* The certificate of the register of the United States land office, of the entry of land, confers such a title on the purchaser as may be levied upon and sold under attachment or execution. Although he may not technically own the fee, he has such a title as is liable to such a sale. *Ibid.* 404.

9. *Inadequacy of consideration, as a ground for equitable relief.* See CHANCERY, 11.

SALE OF CHATTELS.

10. *Of the time of payment.* See TROVER, 2.

SCHOOLS.

SCHOOL TREASURER'S BOND.

1. *Of its approval.* Where the board of education of a school district elected a treasurer, required him to give bond, which he did, with security, and it was received by the board and acted upon by the parties: *Held*, to be a sufficient approval, without any such indorsement on the bond, or any entry thereof on their records. Such acts imply an approval. The provision of the statute requiring an approval, is merely directory. It was so held in *Green v. Wardell*, 17 Ill. 278. *Bartlett et al. v. Board of Education of Freeport School District*, 304.

2. *Fixing the penalty of the bond.* In such a case, it is not material that the board of education did not fix the penalty of the bond. If executed in a particular sum and not objected to, but received and acted upon, that is sufficient, and it is not error to sustain a demurrer to a plea which acts that up as a defense. *Ibid.* 304.

SUCCESSOR OF TREASURER.

3. *Demand of money from his predecessor.* Under the statute creating a school district, it authorized the treasurer to receive all moneys of the district, and when the successor to a treasurer was appointed, giving bond to the satisfaction of the board, he may make a demand of his predecessor for all moneys in his hands belonging to the district, and such a demand, under the conditions of his bond, fixes the liability of his predecessor and his sureties. *Ibid.* 304.

## SERVICE OF PROCESS.

## UPON A MARRIED WOMAN.

*Or whether service upon the husband is sufficient.* See PROCESS, 1, 2, 3.

SHERIFF'S RETURN. See PROCESS, 7, 8.

## SPARTA, COURT OF COMMON PLEAS OF.

## ITS TERRITORIAL JURISDICTION.

1. The territorial jurisdiction of the court of common pleas of the city of Sparta is, by the provisions of the constitution of 1848, relating to inferior local courts, circumscribed by the city limits. *Gardner v. Witbord*, 145.

## WRIT ISSUED THEREFROM.

2. *How directed.* A writ issued from the court of common pleas of the city of Sparta, in Randolph county, is properly directed "to the city marshal and all sheriffs, coroners and constables of said county." *Ibid.* 145.

3. *Writ, whether void—service.* Although the mandate of a writ, issued from such court, is to summon the defendant, "if he shall be found in your county," etc., yet the service, if shown by the return to have been made in the city of Sparta, is good, otherwise it is defective. But the writ itself, by reason of such mandate, although the service be defective, is not void, and should not be quashed. *Ibid.* 145.

4. *Venue of the writ.* In the margin of a writ, issued out of the common pleas court of the city of Sparta, in Randolph county, the proper State and county were named, and the command in the body of the writ was to summon the defendant "to be and appear before the common pleas court of Sparta, of said county, on," etc., "to be holden," etc., "at the court house in Sparta, in said Randolph county," etc: *Held*, the venue was well enough laid. *Ibid.* 145.

## SPECIAL ASSESSMENTS.

## OATH OF COMMISSIONERS.

1. Where a special assessment was made for the improvement of a street in a city, it is not an objection to the validity of the assessment that the commissioners took the oath required by the city charter, and also superadded other clauses not inconsistent with the oath required by the charter, or any of its provisions. *Rich et al. v. City of Chicago*, 286.

## CERTIFICATE OF PUBLICATION.

2. *Sufficiency thereof.* Where there was published a notice of application for a confirmation of the assessment, and the publisher certified that the notice had been published six days consecutively, excepting Sundays and holidays, giving the date of the first but not the last

**SPECIAL ASSESSMENTS.**

**CERTIFICATE OF PUBLICATION.** *Continued.*

publication: *Held*, the certificate was too indefinite, and was insufficient. *Rich et al. v. City of Chicago*, 286.

**PROCEEDINGS UNDER THE CHARTER OF CHICAGO.**

8. *Sufficiency thereof.* A proceeding to assess the damages for opening a street, under the charter of the city of Chicago, was held not obnoxious to any constitutional objection. The charter makes it indispensable, for a sale of real estate for the payment of such an assessment, that a judgment of some court of general jurisdiction be had upon the warrant. The acts of the commissioners may be considered ministerial, and as the means by which the proceedings instituted are to be brought before the court, and for that purpose are valid. All questions pertaining to the damages sustained or benefits conferred by the condemnation of land, or other property, for public use, may be raised and tried in the court where judgment is sought on the warrant. *Ibid.* 286.

**VALIDITY OF AN ORDINANCE.**

4. *Whether properly passed by the common council.* Where such an improvement is proposed, and it is not petitioned for by a majority of the owners of property to be assessed, the charter declares that it shall be ordered only by the votes of at least three-fourths of all the aldermen present, such vote to be by ayes and noes on the record of the common council. And if, when the record is presented, it does not appear that the improvement was ordered by a vote of three-fourths of the aldermen present, and the vote was not entered by ayes and noes: *Held*, that the ordinance is void, and judgment for a sale of the property to pay the assessment, can not be rightfully entered. *Ibid.* 286.

**DETERMINING THE QUESTION OF COMPENSATION.**

*By whom.* See JUDICIAL ACTION, 1.

**TRIAL BY JURY.**

*Of the right thereto.* See JURY, 1.

**SPECIFIC PERFORMANCE.** See CHANCERY, 12.

**STATE'S ATTORNEYS.**

**COLLECTION OF FINES, FORFEITURES AND PENALTIES.**

1. *Construction of act of 1865.* Within the power conferred on State's attorneys by the act of 1865, which makes it their duty to enforce the "collection of all fines, forfeitures and penalties" imposed

## STATE'S ATTORNEYS.

COLLECTION OF FINES, FORFEITURES AND PENALTIES. *Continued.*

or incurred in the courts of record in their several counties, and pay the same over to the school superintendents of the proper counties, is included the right to receive such fines, etc., and give receipts therefor, that shall operate as a full discharge to the party paying the same; and also the right to receive the amount of any judgment that may have been rendered for any such fine, forfeiture and penalty, and execute acquittance therefor. *The People v. Christerson et al.* 157.

2. Where payment of a judgment, upon a forfeited recognizance, was made to the county treasurer of the county in which the same was rendered, by the direction and consent of the State's attorney in and for the judicial circuit in which such county was situated, it was *held*, such payment amounted to a satisfaction of the judgment—was payment to the attorney himself. The State's attorney had the right to order or agree that the party should pay the money to any solvent bank, or responsible party, for his use. *Ibid.* 157.

## STATE AND FEDERAL COURTS.

## ENJOINING PROCESS OF ONE BY THE OTHER.

*Not allowable.* See CONFLICT OF LAWS, 1, 2.

## STATUTES.

## CONSTITUTIONALITY.

1. *Taxation for corporate purposes—constitutionality of the charter of the city of Belleville.* See TAXATION, 1 to 4.

## STATUTES CONSTRUED.

2. *Assignment of promissory note—proof thereof, when necessary.* Construction of 59th section of Practice act in *Hall v. Freeman*, 55. See ASSIGNMENT, 3.

3. *Attachment will lie upon a judgment rendered in the same court.* First section of the Attachment act construed in *Young v. Cooper et al.* 121.

4. *Giving a new or additional bond by an administrator, under section seventy-eight of the statute of wills—whether it will release the sureties in the original bond.* *The People, use &c. v. Curry et al.* 35. See SURETIES, 6.

5. *Garnishment—when final judgment may be rendered, under act of 1861.* *Horat et al. v. Juckel*, 139. See GARNISHMENT, 3.

6. *Malicious mischief—what constitutes.* The statute on that subject construed in *Sattler v. The People*, 68. See CRIMINAL LAW, 3.

STATUTES. STATUTES CONSTRUED. *Continued.*

7. *Sending process to a foreign county, against a sole defendant.* The act of 1861 construed in *Wirts v. Henry et al.* 109. See PROCESS, 4, 5.

8. *Service of process upon a married woman*—effect of the recent statutes concerning her separate property, upon the rule of the common law. *Piggott et ux. v. Snell*, 106. See PROCESS, 1.

9. *State's attorneys—of their right to collect and give acquittances for fines, forfeitures and penalties, under act of 1865.* *The People v. Christerson et al.* 157. See STATE'S ATTORNEYS, 1, 2.

10. *Taking solicitors' fees as costs*—the act of 1869 construed in *Lilly et al. v. Shaw et al.* 72. See COSTS, 3.

11. *Evidence of deceased witness on former trial—whether competent to be proven on a subsequent trial, under act of 1867.* *Hutchings, Admr. v. Corgan*, 70. See EVIDENCE, 12.

12. *Witnesses—of their competency, under act of 1867.* *Merrill et al. v. Atkin*, 19. See WITNESSES, 1.

13. *Witnesses—whether widow of testator may testify in behalf of the executor, under act of 1867.* *Reeves v. Herr, Exor.* 81. See WITNESSES, 2.

## STATUTE OF FRAUDS.

## PROMISE TO PAY THE DEBT OF ANOTHER.

1. A, being indebted to B, executed to him a promissory note for a sum larger than the indebtedness, and secured the same by a chattel mortgage on property fully worth the amount of the note. For the excess of the sum secured by the mortgage over the actual indebtedness, A was to receive from B certain lumber, but which he never received. A afterwards became indebted to C, but being in embarrassed circumstances could not pay him, all his property being covered by the mortgage, which B had proceeded, or was about to proceed, to foreclose. The three parties met together, and to satisfy the claim of C, an arrangement was made by which the demand A had on B for the difference between his actual indebtedness and that expressed in the mortgage, was compromised at the sum A owed C, B agreeing to pay the same to C: *Held*, B's promise in that regard was not within the statute of frauds. *Runde v. Runde*, 98.

## OF A PAROL LICENSE.

2. *When executed—not within the statute.* See LICENSE, 5.

## SUBSCRIPTION.

## TO STOCK OF A RAILROAD COMPANY BY A COUNTY.

1. *Application of bonds issued therefor.* Where the bonds of a county, issued upon a subscription of the county to the stock of a

## SUBSCRIPTION.

TO STOCK OF A RAILROAD COMPANY BY A COUNTY. *Continued.*

railroad company, were delivered to the bankers of the company, upon the stipulation between the county authorities and the company, that they were to be applied in payment for work done upon the road within the county and not elsewhere, it was *held*, the sense of the stipulation, in view of its purpose, was, not that those identical bonds should pay for work done in that county, but it was, if work was done in the county, the bonds should be delivered to the company. *Thomas v. County of Morgan et al.* 479.

2. *By whom the condition may be performed.* Nor is it essential, in such case, in order to create the obligation of the county to deliver the bonds, that the work should be done by the company to the stock of which the subscription was originally made, and with which the stipulation was entered into, but if the work was done by the successors of that company, endowed with all the rights, privileges and franchises of the latter, that would be a substantial performance of the condition upon which the bonds were to be delivered. *Ibid.* 479.

3. *Rights of creditors of the original company, and of their assignees, in respect to such bonds.* And where the original company had incurred a debt on account of work done upon the road, and in payment thereof gave to their creditor an order upon the custodian of the bonds for a sufficient amount of them to satisfy the same, which order was sold and assigned to a third person, but, by reason of there having been no work done upon the road within the county, there was no obligation to deliver any bonds upon such order, it was *held*, that if work was subsequently done within the county by the successors of such original company, so as to comply with the condition upon which the bonds were to be delivered, then the order issued by the original company would operate as an equitable transfer to the holder thereof, of so much of the county subscription, represented by the bonds, as was embraced in the order. *Ibid.* 479.

4. *Remedy of such assignee—and herein, of a creditor's bill.* In such case, where the custodian of the bonds, under the direction of the county authorities, refused to deliver the bonds called for by the order of the railroad company, the holder of the order has his remedy in chancery to compel their delivery to him, without first proceeding at law against the company as for a debt due from them to him as the assignee of their order. A bill filed for such purpose would not be regarded as a creditor's bill, nor in the nature of one. *Ibid.* 479.

## SURETY.

## EXECUTING BOND ON CONDITIONS.

1. *Delivery of the bond without performing the condition.* Where a person signed an official bond as a surety, and it was agreed between

**SURETY. EXECUTING BOND ON CONDITIONS.** *Continued.*

him and the principal in the bond that it should not be delivered to the obligee until another person, who was named as a surety, should sign the bond, but it was delivered without obtaining his signature: *Held*, that when the surety thus signed and delivered it to the principal, having intended to execute an operative bond, the obligee has the right to presume, in the absence of notice, that the surety had conferred full general authority to deliver the bond. Such an agent may bind his principal to the extent of his apparent authority. *Smith v. Board of Supervisors of Peoria County*, 412.

2. *Of the duty of the obligee in such case, to make inquiry.* In such a case, it is not negligence in the obligee to fail to go to the surety and make inquiry whether there are any secret agreements between them not complied with. The surety had reposed confidence in his principal, and the obligee was not required to suspect that the principal was acting fraudulently. The surety, in such a case, runs the risk of the fraud of the principal whom he has intrusted with the delivery of the bond. It is his duty, under such circumstances, to see that the authority he has delegated is not abused, and it is not just or reasonable to permit him to take advantage of its abuse. *Ibid.* 412.

3. *Effect of notice to the obligee, of the condition.* Where such a bond is executed and delivered as an *escrow*, and the condition is not performed, that fact can be shown in defense, or where it is agreed by the principal and surety that the bond shall not take effect until a particular person also signs as surety, and the obligee has notice of the agreement, the fact that such person did not sign as a surety, may be shown in defense. And it is error for the court to refuse to permit the defendant to make proof of such facts, under the plea of *non est factum*. *Ibid.* 412.

**SURETY ON COUNTY TREASURER'S BOND.**

4. *Extent of liability—and herein, of an increased liability.* Where a county, under legislative authority, levies a tax to build a jail and an alms house, and issues bonds to be sold to raise money for such purpose, and the tax is collected, and the bonds placed in the hands of the treasurer and sold, and the money from both sources comes to the hands of the treasurer, his sureties are liable on their bond for any delinquency in failing to pay out the money according to law. And where county orders, drawing interest, are issued, and placed in the hands of the county treasurer to be sold, and the proceeds applied in redeeming other county orders, and they are sold by the treasurer, the money has been legally raised, and is in his hands as treasurer, and his sureties are liable for its misapplication. *Ibid.* 412.

5. Where, after a county treasurer has been elected and given bond, the county authorities, under laws existing at the time, and a special act of the general assembly subsequently passed, authorizing the levy

**SURETY. SURETY ON COUNTY TREASURER'S BOND. *Continued.***

of a tax and the erection of an alms house, proceeded to levy the tax and to construct such a building, such action did not impose such additional liability as would release the sureties on the treasurer's bond. They will be presumed to have become sureties knowing that such acts could and might be done during the official term of the treasurer. Such sureties are liable for the faithful performance of all duties of such an officer, whether imposed by laws enacted previous or subsequent to the execution of the bond, only so that it comes within the scope of his official duty. *Smith v. Board of Supervisors of Peoria County*, 412.

**SURETIES OF ADMINISTRATOR.**

6. *Effect of giving an additional bond.* A new or additional bond, given by an administrator under section seventy-eight of the Statute of Wills, can not operate to discharge his sureties in the original bond. *The People, use, etc., v. Curry et al.* 35.

7. *Liability of sureties thereon.* See ADMINISTRATION OF ESTATES, 1 to 4.

**RATIFICATION.**

8. *As to filling blanks in a bond after it is signed.* A school treasurer's bond was signed, leaving a blank for the penalty, which was afterwards inserted by the principal and delivered to the obligees. In an action on the bond, it was *held*, where sureties know that there is such a blank, and they sign the instrument and fail to notify the obligees that they regard the bond as void, and they know that, by filing the bond, the treasurer would obtain money, it will be inferred that they ratified the act, rather than that they were intending to aid the treasurer to perpetrate a fraud on the obligees. *Bartlett et al. v. Board of Education*, 364.

9. In such a case, where the sureties, after finding that their principal had appropriated the fund, took mortgages and other securities, it is evidence from which a jury may infer that authority had been given, or that a ratification had been made. *Ibid.* 364.

10. Where an obligor intends to, and does act, which fully recognize the validity of a bond, it need not be present and formally delivered to constitute a valid ratification. *Ibid.* 364.

**TAXATION.****TAXATION FOR CORPORATE PURPOSES.**

1. *Application of the rule of uniformity—constitutionality of the charter of the city of Belleville.* The rule of equality and uniformity of taxation prescribed by the constitution must be applied, not only to the rate of taxation, and to the district to be taxed, but also to all the property subject to taxation. *Primm et al. v. City of Belleville*, 142.



TAXATION. TAXATION FOR CORPORATE PURPOSES. *Continued.*

2. The charter of the city of Belleville provides that the city council may lay off the city into districts for the construction of sewers, and levy and collect a special tax on the real estate within any district to be drained. The city council, by ordinance, undertook to exempt improvements on real estate from such special tax: *Held*, the ordinance, in exempting improvements upon the real estate, was a violation of the charter. Fixed and permanent buildings upon land form a part of it, and should be estimated in assessing its value for purposes of taxation. *Primm et al. v. City of Belleville*, 142.

3. It was likewise beyond the constitutional power of the legislature to make the discrimination in favor of personal property. If the sewerage was proper, and the taxes assessed to effectuate it were for a corporate purpose, then they must be uniform as to persons and property. The burden must be imposed upon all the property within the limits to be taxed. *Ibid.* 142.

4. So, too, that portion of the charter which authorizes the tax to be levied in a particular district in the city is in violation of the constitution. The legislature can not clothe the corporate authorities of the municipality with power to assess and collect taxes from only a part of the municipality, for a corporate purpose. The corporate purpose must extend to the entire city, and in the apportionment of the tax to effectuate the purpose, the principle of equality and uniformity must be observed. *Ibid.* 142.

5. *Creating a debt against a city—who may be authorized so to do.* See CONSTITUTIONAL LAW, 1.

## TELEGRAPHY.

## GIVING DIRECTIONS TO AN OFFICER.

1. It is competent for the plaintiff in an execution to direct the sheriff, by telegraph, to suspend a sale thereunder. *Morgan et al. v. The People, use of Lewis*, 58.

## TELEGRAPHIC DISPATCH AS EVIDENCE.

2. *And herein, what is regarded as the original message.* In such case, the telegram delivered to the sheriff at the end of the line is the original message—is evidence of its contents, and obligatory upon the officer. *Ibid.* 58.

3. The question as to what is the original message, depends upon whose agent the telegraph company is. Where the party sending a message is the responsible party, and sends a message for the purpose of giving directions to be acted upon, then the message delivered at the end of the line is the original. *Ibid.* 58.

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**TENANTS IN COMMON.****OF JOINT PURCHASES FOR PURPOSES OF SALE.**

*Rights of the parties, and how adjusted.* See **JOINT RIGHTS AND INTERESTS**, 1 to 7.

**TITLE.****UNDER CERTIFICATE OF REGISTER OF LAND OFFICE.**

*Subject to levy and sale on execution.* See **SALES**, 8.

**TRESPASS.****FOR TAKING PERSONAL PROPERTY.**

1. *Whether the action will lie.* In an action of trespass for the forcible taking of a cow, it appeared the plaintiff had sold the cow, and the defendant purchased the animal from his vendee, and at the time of the taking she was in the possession of a third party, and the plaintiff told the defendant he had sold her, and that he might take her: *Held*, there was no trespass, although the defendant, in taking his property, used such violence as amounted to a breach of the peace. *Miles v. Wooters*, 234.

**ENTRY BY FORCE.**

2. *To remove fixtures.* It is not lawful for a party, claiming that certain things placed in a building are fixtures, to make a forcible entry on the possession of the owner or his tenants, to remove such fixtures, and the party in possession would have the right to use a sufficient amount of force to prevent such an entry. *Hamilton v. Stewart et al.* 330.

**TRESPASS BY AN OFFICER.**

3. *In the execution of process.* See **OFFICERS**, 5.

**TROVER.****WHETHER IT WILL LIE.**

1. In an action against a railroad company, it appeared the plaintiff had hauled out and delivered on the line of defendants' road a certain number of fence posts, for the purpose of selling the same, at a place where fence posts were delivered for and received by the builders of defendants' road; that the posts, without the knowledge or consent of the plaintiff, were loaded on a construction train on defendants' road and taken away and used, by the employees of McKeen, Smith & Co., to fence the defendants' road; that the defendants had made a contract with McKeen, Smith & Co., to construct and fence their road for a stipulated price, and for that purpose had given them the exclusive control over the road until its completion, and all the earnings over

**TROVER. WHETHER IT WILL LIE. *Continued.***

and above the cost of operating the road, to be paid over by the contractors to the company; that before the institution of the suit the road had been fully completed and turned over to the defendants. The plaintiff had no contract with the defendants in regard to the posts: *Held*, the posts having been placed upon and attached to the lands of the defendants by the contractors, while they were operating the road and without the plaintiff's consent, thus becoming a part of their realty and thereby being in the possession of the defendants, the plaintiff could maintain an action of trover against the company for the value of the posts. *St. Louis, Vandalia & Terre Haute Railroad Co. v. Kaulbruner*, 152.

**BY A VENDOR OF CHATTELS.**

2. *Where the vendee refuses to pay.* Where property is sold, to be paid for on delivery, and it is delivered, and the purchaser, refusing to make payment, appropriates the property to his own use, trover will lie. In such a sale, payment is a condition precedent; but if the seller deliver fully and unconditionally, he thereby waives the condition of precedent payment, and the right of property passes to the purchaser; but if there is no waiver, it is otherwise, and the rule does not apply where the goods are delivered with the expectation of simultaneous payment, and the purchaser holds the property and refuses to pay—that amounts to a conversion. *Matthews et al. v. Cowan et al.* 341.

**SUFFICIENCY OF PROOF.**

3. *To show a cause of action.* In an action of trover for a horse, it did not appear that the defendant had ever exercised any control over the horse, or that any demand was made before suit brought. There was evidence tending to show a ratification by the plaintiff of a sale of the horse previously made by a bailee. It was *held*, the proof failed to establish a cause of action, and an instruction which directed the jury that if the bailee was not authorized to sell the horse, they should find for the plaintiff, being the only instruction given, was erroneous, because it excluded from the consideration of the jury the question whether there was a wrongful conversion, either by a tortious taking, or a refusal to deliver on demand, and also excluded the subject of a subsequent ratification. *Snell v. Weir*, 404.

**TRUSTS AND TRUSTEES.****OF THE MODE OF SALE BY A TRUSTEE.**

1. A trustee may either sell the trust property at auction or private sale, unless the manner of doing so shall be prescribed in the instrument conferring the power. *White et al. v. Glover*, 459.

TRUSTS AND TRUSTEES. *Continued.*

## POWER COUPLED WITH AN INTEREST.

2. In this case the trustee was invested with a power coupled with an interest, as he was authorized to sell the lands and to hold and possess them for the purpose of the trust. *White et al. v. Glover*, 459.

## NEGLECTENCE OF THE TRUSTEE.

8. *Whether chargeable with acts over which he has no control.* Where the owner of personal property placed the same in the hands of a third person, under an agreement that the latter should sell the property, and with the proceeds pay the debts of the former, and while the property was so held it was seized under an attachment against the owner, and subsequently sold under a judgment in that proceeding, it was held, the person who was thus prevented by legal process, over which he had no control, from performing his agreement, could not be charged with the value of the property, or the loss occasioned by the forced sale. *Baehr v. Wolf et al.* 470.

## COMPENSATION FOR SERVICES.

4. *When it must be claimed.* Where the account of a trustee is referred to the master for adjustment, and he has failed to claim compensation for his services as trustee, by answer to the bill, or presenting his claim before the master, when adjusting his account, he has no power for the first time to raise the question in this court on error. *Hurd v. Goodrich*, 450.

POWER TO SELL AND CONVEY REALTY, BY WILL. See WILLS, 1, 2.

## WASTING A TRUST FUND.

*Duty of a court of chancery to prevent it.* See CHANCERY, 4.

WHEN TRUSTEE LIABLE FOR COMPOUND INTEREST. See INTEREST, 2.

VARIANCE. See PLEADING AND EVIDENCE, 1 to 9.

## VENDOR AND PURCHASER.

## PURCHASE MONEY—FAILURE OF TITLE.

1. A purchaser of land, receiving a deed therefor with covenants of title, can not avoid the payment of a promissory note given for the purchase money, on the ground that the grantor had no title, if his possession has not been disturbed, nor the paramount title asserted. *Whitlock et al. v. Denlinger*, 96.

2. The grantee can not retain the benefit of the covenants in the deed from his grantor, and the possession of the premises, and yet avoid the payment of the purchase money. *Ibid.* 96.

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**VENUE.** *Continued.***IN CRIMINAL CASES.**

*Venue must be proven.* See **CRIMINAL LAW**, 9.

**VERDICT.****IN CASE OF MISJOINDER OF COUNTS.**

In an action upon a covenant to two jointly, where some of the assignments of breaches are for damages resulting to both plaintiffs,—one for damages sustained by one plaintiff, and another for damages sustained by the other, as to which his co-plaintiff has no interest, there is a misjoinder of counts; and if, in such case of misjoinder of counts, entire damages be given upon all the counts, the judgment will be reversed on error. Nor would the fact that the action was brought in the name of both obligees, for the use of one, change the application of the rule in that regard. *Safford v. Miller et al.* 205.

**FINDING A VERDICT BY COMPROMISE.** See **JURY**, 8.

**VOID AND VOIDABLE.****IRREGULARITIES IN SALES ON EXECUTION.**

*Effect thereof.* See **SALES**, 1 to 4.

**WAIVER.****WAIVER OF LACHES.**

*By drawer of bill of exchange.* See **PLEADING AND EVIDENCE**, 14.

**WAIVER OF PLEA IN ABATEMENT.**

*By pleading in bar.* See **ABATEMENT**, 1.

**TRIAL UPON BILL AND ANSWER, IN CHANCERY.**

*Waiver in respect thereto.* See **CHANCERY**, 9.

**WARRANTY.****PARTIAL BREACH OF WARRANTY.**

*As to personal property—recovery of purchase price.* In an action on a promissory note, given for the purchase money of two mules, as a defence thereto the defendant set up an alleged warranty, by the plaintiff, that the mules were sound, averring that they were unsound, and by reason of which they both died. The evidence established the fact that one of the mules was sick before the sale, but as to the other there was some doubt as to whether there had been anything the matter with it at the date of the sale. The defendant not having offered to return the property and rescind the contract, on the ground of the deceit practiced, an instruction which directed the jury, in case there

**WARRANTY. PARTIAL BREACH OF WARRANTY. *Continued.***

was a warranty, that if either of the mules was sick, they should find for the defendant, was regarded as erroneous, inasmuch as it did not follow that, if one of the mules was unsound, the plaintiff could not recover for the other, if sound, notwithstanding the warranty. *Cochran v. Chilwood et al.* 58.

**IN RESPECT TO INSURANCE.**

*Of warranty by the assured.* See INSURANCE, 4.

**WARRANTY BY AN AGENT.**

*Whether the principal bound.* See AGENCY, 6.

**WILLS.**

**TRUSTEE—POWER TO SELL AND CONVEY.**

1. *And herein, of a conveyance to the widow in lieu of dower.* Where a testator, by his will, devises all his property to a trustee, to pay debts, to set off to his wife her share of the estate under the laws of the State, and to hold the remainder in trust for his children, and with power to sell and convey the same and invest the proceeds for the support of his children, and to convey the same, or the proceeds thereof, to them when they should become twenty-one years of age: *Held*, that the will conferred ample power to sell and convey real estate, and a conveyance of a portion to the widow in lieu of her dower and all claim on the estate, and it will be presumed, in the absence of fraud, to be for the best interest of the estate, and was within the power conferred by the will. *White et al. v. Glover*, 459.

2. A decree of a court of equity licensing such a conveyance, although made without having jurisdiction, would not affect or abridge the power conferred by the will. And it is doubted whether a court of equity can convert a life estate into a fee, but the want of such power did not affect the deed executed under the will. *Ibid.* 459.

**WITNESSES.**

**COMPETENCY.**

1. *Under the act of 1867.* The second section of the act of 1867, which prohibits a party from testifying when the adverse party sues or defends "as executor, administrator, *heir*, legatee or devisee of a deceased person," with certain exceptions enumerated in the act, applies as well in favor of the heir by one remove as in behalf of the immediate heir. The true intent of the statute was to make the right of a party to testify a mutual right, and not to grant it, with the exceptions enumerated in the act, where the adverse party claims in a representative capacity under a deceased person. *Merrill et al. v. Atkin*, 19.

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WITNESSES. COMPETENCY. *Continued.*

2. *Act of 1867—whether widow of testator may testify in behalf of executor.* In an action by the executor of a deceased person, to recover on an account in favor of the deceased against the defendant, it was *held*, incompetent for the widow of the testator to testify for the plaintiff in relation to a conversation of the defendant with her husband in her presence after their marriage, in regard to the account, by which it was sought to prove an admission by the defendant of the account sued on, and a promise, on his part, to pay the same within the period fixed by the statute of limitations barring such an action, it not appearing that the witness had a direct interest in the event of the suit. *Reeves v. Herr, Ex'or*, 81.

## CREDIBILITY.

3. *Jury to determine.* Where the testimony of two witnesses is in conflict, it is for the jury, from the evidence as given, together with the manner of the parties when they testify, and from surrounding circumstances, to determine which is entitled to credit; and they should be so instructed, when necessary. *Cotton v. Holliday*, 176.

## WRIT OF ERROR.

WHETHER IT WILL LIE. See APPEALS AND WRITS OF ERROR, 1.

*G. H. J.*

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| 5a 550     | 89a 401   | 16c        | 154 267  | 118 409    | 78a 198   | 58a 1627  | 75 3406  |      |     |      |
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| 171 288    | 14a 549   | 59a 162    | 87 367   | 54a 615    | 59 419    | 156 174   |          |      |     |      |
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| 120 214    | 103       | 166 1579   | 1a 608   | 106 397    | 375       | 470       |          |      |     |      |
| 120 1666   | 148 1388  | 27a 619    | 1a 504   | 41a 2 81   | 80 1481   | 150 288   |          |      |     |      |
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| 2a 1406    | 119 4485  | 78 3191    | 24a 512  | 8a 255     | 78 1247   | 492       |          |      |     |      |
| 20a 1354   | 149 4326  | 146 658    | 27a 2150 | 12a 167    | 72 3866   | d 160 169 |          |      |     |      |
| 31a 1270   | 20a 599   | 92 7489    | 286      | 12a 656    | 88 303    | 9a 1527   |          |      |     |      |
| 58         | 77a 445   | 84 3842    | 84 3842  | 18a 6 88   | 144 348   | 76a 148   |          |      |     |      |
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| 72         | 72 1464   | 237        | 306      | 341        | 2a 1845   | 65 138    |          |      |     |      |
| 156 1174   | 78 1522   | d 61 1105  | 60 4198  | 60 4198    | 10a 1 54  | 67 358    |          |      |     |      |
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ABBREVIATIONS USED.—A, B, C means two or more cases on page; a, criticised; d, distinguished; e, explained; f, followed; L, limited; o, overruled; m, modified; p, parallel case; q, qualified; s, same case; w, wrong application; small figures indicate the section to which reference applies; \* indicates reference is to a point not mentioned in syllabus.





